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Federal Council report on banking stability

including an evaluation in accordance with Article 52 of the Banking Act

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Council

Summary

Background

In mid-March 2023, the crisis at Credit Suisse suddenly worsened. The imminent collapse of this global systemically important bank (G-SIB) was averted by, among other things, liquidity assistance from the Swiss National Bank (SNB) and the announcement on 19 March 2023 that Credit Suisse would be taken over by UBS. The Federal Council and the Finance Delegation enabled this solution by means of state guarantees to the SNB and UBS, which were granted under emergency legislation. The Federal Council's aim was to safeguard the stability of the financial system and minimise the costs for the economy and the taxpayer. This aim was achieved. The liquidity assistance loans from the SNB granted under emergency legislation were repaid and the state guarantees were terminated in August 2023.

The magnitude and pace of the Credit Suisse crisis, the need to provide state support to a G-SIB once again, after the UBS crisis in 2008, the use of emergency legislation and the fact that only a single, even larger, G-SIB now remains call for a comprehensive review of the events, and a detailed evaluation of the existing too-big-to-fail (TBTF) regime. Numerous parliamentary procedural requests relating to the TBTF issue, which were submitted in the wake of the Credit Suisse crisis, underscore the need for such an assessment.

Contents and structure of the report

In this review of the Credit Suisse crisis, the Federal Council focuses on the need for action in order to strengthen the resilience and stability of systemically important banks (SIBs) and of the Swiss financial centre, and thereby further reduce the risks to the economy and the taxpayer.

The report fulfils the evaluation mandate pursuant to the dispatch of 29 March 2023 on addendum IA to the 2023 budget. In addition, it responds to the postulates referred by Parliament on the TBTF regime and on other topics whose scope goes beyond the TBTF issue. Finally, this report meets the Federal Council's legal obligation to regularly review the regulation of SIBs against international standards in accordance with Article 52 of the Banking Act.

The report is based on a broad set of internal and external expert opinions, and is divided into three parts. Part I summarises the background, the need for action and the recommended measures. Part II contains a detailed discussion of the background and the comprehensive assessments on which the conclusions on the need for action and the recommended measures are based. It presents an in-depth appraisal of the TBTF regime, and of other topics in the areas of corporate governance and supervision which have proved to be key for the stability of the financial centre. Part III contains supporting materials.

The further preparation of provisions on the TBTF regime at legislative and ordinance level will also take account of the findings from the ongoing work on "Management by the authorities – CS emergency merger" by the Parliamentary Investigation Committee (PInC) commissioned by Parliament. The PInC is investigating the role and actions of the competent authorities during the Credit Suisse crisis.

Findings and need for action

A stable, international and broad-based financial centre is crucial for the Swiss economy and the quality of the business location. Accordingly, the Federal Council is maintaining its financial centre strategy of 4 December 2020. It considers stability and resilience to be the indispensable foundation for an attractive, innovative, globally interconnected and sustainable financial centre. The special circumstance of a G-SIB that is very large relative to gross domestic product (GDP) calls for clear, convincing and effectively implemented regulatory framework conditions.

Based on the assessment, the Federal Council concludes that many of the measures introduced at national and international level to increase financial stability have generally proved their worth. It still considers the existing objectives of the TBTF regime – reducing risks for the Swiss financial system, safeguarding systemically important banks' economically important functions and avoiding state aid – to be expedient and appropriate.

However, the assessment also revealed gaps in the existing regime, and a clear need for action to further develop and strengthen the regulatory framework. Specifically, there are three focus areas:

– Focus area 1: Strengthening the prevention regime
– Focus area 2: Strengthening the liquidity regime
– Focus area 3: Expanding the crisis toolkit.

Six fields of action are derived from these three focus areas, and specific measures are proposed for each field.

There should be a targeted introduction of the proposed measures for SIBs, some of them specifically for G-SIBs. However, certain measures, especially in the areas of corporate governance and the toolkit of the Swiss Financial Market Supervisory Authority (FINMA), also apply to other financial institutions.

Overall, the further development is intended to bring about a strengthening of accountability (of banks and bank management bodies, but also of bank customers), and not a greater reliance on the state. The implementation of the measures should be proportionate and effective. The TBTF regime should continue to be as practicable and internationally comparable as possible.

Finally, it should be noted that crisis situations are, by nature, unpredictable. Accordingly, the option for the Federal Council to act in the interests of the country, and on the basis of the Federal Constitution under emergency law in specific crisis situations, cannot and should not be ruled out categorically, although the Federal Council should generally refrain from using emergency law whenever possible.

Incurring high costs by regulating for a specific crisis should also be avoided, if the contribution of such regulations to prevention and crisis management is unclear. The focus of this report is thus on principles-based measures that strengthen the resilience and stability of SIBs and the Swiss financial centre as a whole.

Derived fields of action and proposed measures

Focus area 1: Strengthening the prevention regime
The Credit Suisse crisis was the result of repeated incidents and irregularities at the bank, which dragged on for several years despite intensified supervisory and enforcement activities by FINMA, and culminated in an acute crisis of confidence in March 2023.

The first fundamental focus area of the further development of the TBTF regime involves strengthening prevention and reducing the likelihood of a SIB finding itself in a similarly critical situation.

Capital and liquidity requirements are decisive elements in the resilience and stability of a SIB. However, they are not sufficient on their own to ensure such resilience and stability. In addition to meeting specific regulatory requirements, institutions must in particular also take responsibility for their long-term orientation (e.g. in terms of strategy, corporate governance and corporate culture). Regulation and supervision cannot replace this accountability, although the incentives as regards corporate governance can be made stronger. The more serious the impact of a financial institution's failure on financial stability, the economy and taxpayers, the more important the subsidiary role of regulation and supervision becomes.

The Federal Council has identified the following three fields of action in which the existing regime can be supplemented and strengthened:

– *Field of action 1: corporate governance and supervision.* The corporate governance of SIBs should be promoted, and FINMA's supervision strengthened. Specifically, a senior managers regime and measures on variable remuneration (e.g. retention periods and clawbacks) should be introduced. This would help to achieve appropriate, responsible risk management. Moreover, additional tools (e.g. an extended duty to provide information and to report) should enable FINMA to intervene more effectively in this area.

- *Field of action 2: capital requirements.* Capital requirements for SIBs should be tightened, especially with regard to the weaknesses that became apparent during the Credit Suisse crisis. For this purpose, the capital requirements should be implemented more strictly and increased for foreign participations. Moreover, forward-looking elements should be introduced in the institution-specific capital surcharge (Pillar 2). Furthermore, the requirements should continue to align with international rules and international practice, while taking competitiveness into account.

- *Field of action 3: early intervention and recovery.* FINMA's options and duties with regard to early intervention should be strengthened and the planned stabilisation measures for SIBs should be expanded. It should be possible to rapidly stabilise a distressed bank with timely measures according to clear criteria. In this regard, the use of market indicators to trigger early interventions should be examined, among other things.

Focus area 2: Strengthening the liquidity regime
Banks are susceptible to liquidity crises due to their maturity transformation function, in which they accept deposits that must be available at short notice but grant longer-term loans. The liquidity outflows in autumn 2022 and spring 2023, both at Credit Suisse and in the US banking sector, took on a new dimension and complexity in terms of both scale and speed.

These increased dynamics must be factored into the regime for SIBs, and for banks generally, to a greater extent in the future. Accordingly, the following field of action was identified:

- *Field of action 4: ensuring liquidity in a crisis.* The liquidity levels of SIBs and the banking sector as a whole in the event of a crisis should be substantially expanded.

As a first line of defence, the banks' own sources of liquidity are to be strengthened. This is already being implemented by means of the special liquidity requirements which SIBs have to meet in full by the end of 2024. As required by law, the effectiveness of these special liquidity requirements will be reviewed by 2026. At international level, Switzerland will work to ensure that the liquidity ratios and requirements are reviewed and strengthened in light of the findings.

As a second line of defence, the potential for liquidity provision via the central bank as lender of last resort (LoLR) should be significantly expanded. With regard to this objective, as part of the implementation of postulate 23.3445 "Review of the SNB's toolkit" and taking the SNB's constitutional mandate into account, the existing legal framework for the LoLR should reviewed and refined where necessary. Another important element in the strengthening of the LoLR regime is the expansion of preparatory measures by the banks, including by means of new obligations.

As a third line of defence, the possibility of a public liquidity backstop (PLB) should be enshrined in law, so that a resolution – in other words, a restructuring or bankruptcy liquidation with continuation of the systemically important functions in accordance with the emergency plan – can be supported with state-guaranteed liquidity assistance. Internationally, the PLB is part of the standard toolkit for banking crises. In September 2023, the Federal Council adopted the dispatch on the PLB for the attention of Parliament.

Focus area 3: Expanding the crisis toolkit
The risk of insolvency of a bank can never be ruled out entirely. In a crisis, SIBs must be able to exit the market in an orderly manner. This option is crucial for the functioning of the financial market and the economy. This gives rise to the following field of action:

- *Field of action 5: resolution planning.* Resolution planning – and thus the resolvability of a SIB – should be further improved.

Assessments have shown that the resolution of a G-SIB in particular carries risks that must be taken seriously, including legal and implementation risks at both international and national level which need to be further reduced. Against this background, the options available for resolution should be expanded and resolution strategies tailored to various crisis scenarios should be prepared. Resolvability will also be increased through targeted requirements in terms of capital.

Finally, the following field of action was identified:

– *Field of action 6: crisis organisation and cooperation between authorities.* The crisis organisation and the cooperation between the authorities should be strengthened.

In the view of the Federal Council, the crisis organisation in the Credit Suisse case worked in principle, leading to a solution that quickly stabilised the situation. Nevertheless, with regard to future crises and taking into account an international comparison, it makes sense to examine whether and to what extent the roles and responsibilities should be further clarified and the cooperation and decision-making, in particular among FINMA, the SNB and the Federal Department of Finance (FDF), should be regulated more clearly. The findings of the PInC will have to be taken into account in this regard.

Outlook

In the view of the Federal Council, the proposed measures form a package; they were selected on the basis of their impact as a whole. Their implementation will significantly reduce the likelihood of another crisis at a SIB in Switzerland. Should a crisis nonetheless occur, the recoverability and resolvability of a SIB will be greatly increased. The specific design of the individual measures will be decisive in this regard.

By implementing these measures at legislative and ordinance level, Switzerland will strengthen not only its own financial and banking centre and thus its status as a business location, but also the stability of the global financial system. Accordingly, Switzerland will also work to promote these measures in the relevant international bodies.

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Structure of the report

In this report, the Federal Council presents the package of measures that it proposes for implementation to strengthen SIBs and financial stability. The report is structured as follows: after an introduction, the measures recommended by the Federal Council for implementation are presented in a compact first part that can be read on its own. The second part contains more detailed information, along with comprehensive assessments and conclusions on the need for action. The third part contains indexes and overviews.

The report is accordingly structured as follows:

Part I describes the background, the main conclusions and the package of measures proposed by the Federal Council. Chapter 2 provides an overview of the existing TBTF regime and its effect in the case of Credit Suisse. Chapter 3 presents the Federal Council's position on fundamental issues relating to the TBTF regime and describes the need for action and the fields of action. Chapter 4 contains the recommended measures to strengthen the stability of SIBs and the Swiss financial centre. Part I thus contains the most important information of the report and can be read on its own.

Part II contains extensive background information and assessments, and is organised thematically. Chapter 5 describes the chronology of the Credit Suisse crisis and the takeover of Credit Suisse by UBS supported by the authorities. Chapter 6 discusses the definition of systemic importance. Chapters 7–17 provide a comprehensive overview and assessment in light of the existing TBTF regime, and of the corporate governance and supervision issues that have proved to be crucial to the stability of the financial centre. These chapters also assess the effectiveness of the existing regulatory framework in the case of Credit Suisse. Possible measures for adjustments are discussed and, in compliance with Article 52 of the Banking Act, an international comparison is made in this regard. The following topics are discussed: capital requirements (chapter 7), liquidity requirements (chapter 8), liquidity assistance (chapters 9 and 10), deposit insurance (chapter 11), recovery (chapter 12), resolution (chapter 13), structural measures (chapter 14), corporate governance (chapter 15), other supervisory topics (chapter 16) and institutional responsibilities in the area of financial stability (chapter 17).

Part III of the report contains supporting materials, namely a list of figures, a list of tables and a list of boxes, as well as an overview of the expert opinions commissioned and the parliamentary procedural requests. A list of abbreviations is included at the end of the report.

1 Introduction

1.1 Context

The global financial crisis of 2007-08 demonstrated that the distress or failure of a systemically important bank (SIB) can lead to considerable turmoil in the financial system and significant economic damage, as a result of the SIB's services not being substitutable at short notice, and because of its size, market significance and interconnectedness. In the wake of the financial crisis, the Federal Council and Parliament therefore took measures to identify and regulate SIBs in line with international efforts.

The objectives of the too-big-too-fail (TBTF) regime are, firstly, to reduce the likelihood of a banking crisis occurring and the impact of such a crisis and, secondly, to avoid state aid to rescue banks. Numerous countries (including, for example, Germany, Ireland, Iceland, the UK and the USA) spent an estimated total of USD 3,500 billion of taxpayers' money to rescue banks in the course of the 2007-08 financial crisis.[1]

Despite the national and international measures taken, another Swiss SIB, Credit Suisse, became distressed in March 2023. Without comprehensive measures from outside the bank, Credit Suisse would have fallen into disorderly bankruptcy by 20 March 2023 at the latest – with a massive negative impact on the Swiss economy and the international financial markets.

Against this backdrop, the Federal Council, in consultation with the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss National Bank (SNB), initiated measures on 16 and 19 March 2023 to avert serious damage to the Swiss economy and international financial market stability. The takeover of Credit Suisse by UBS, supported by measures taken by the federal government, FINMA and the SNB, led to a rapid stabilisation of the situation. The federal risk guarantees granted with these measures were terminated after a few months in August 2023.

The extent of the Credit Suisse crisis, the need once again for state support via emergency legislation and the fact that only a single, even larger global systemically important bank (G-SIB)[2] in Switzerland remains call for a comprehensive review and the identification of measures to further strengthen the stability of the Swiss financial centre.

SIBs are the focus of this review and of a potential need for action to strengthen financial stability, as is already the case in the existing TBTF regime. In individual areas such as corporate governance, a different scope of application would appear to be necessary, as a result of postulates referred by Parliament, findings from the Credit Suisse crisis or the difficulty in precisely demarcating a measure. Where a different focus is envisaged, this is indicated explicitly.

1.2 Mandate

This report is based on the following mandates:

- **Mandate pursuant to the dispatch of 29 March 2023[3] on addendum IA to the 2023 budget:** As part of the dispatch, the Federal Council instructed the Federal Department of Finance (FDF) to review the events that led to the takeover of Credit Suisse by UBS and the state measures taken, and to comprehensively evaluate the existing TBTF regulations within one year. This review is to be carried out with the involvement of the departments, the Federal Chancellery and external expert opinions, taking into account any reviews decided by Parliament, such as the Parliamentary Investigation Committee (PInC) "Management of the authorities – CS emergency merger".
- **Parliamentary procedural requests:** The report addresses the numerous questions and concerns arising from the parliamentary procedural requests from the National Council and the Council of States on Swiss TBTF regulations and the Credit Suisse case. Page 204 of the report contains a detailed overview. The report addresses the following postulates referred to the Federal Council by Parliament at the time of publication of this report:

[1] Igan et al., The Long Shadow of the Global Financial Crisis: Public Interventions in the Financial Sector, IMF Working Paper WP/19/164, July 2019

[2] For the sake of simplicity, the international term "G-SIB" and the term "internationally active SIB" are used synonymously in this report in accordance with Swiss legislation, see section 2.2 (esp. note 19)

[3] Federal Council, Botschaft über den Nachtrag Ia zum Voranschlag 2023, 29 March 2023, p. 17

- “Make top financial market executives more accountable with lean tools” (postulate 21.3893 from National Councillor Andrey)
- “Effective FINMA sanctions against non-compliant financial institutions” (postulate 21.4628 from National Councillor Birrer-Heimo)
- “Examination of possible legal action against the Credit Suisse management bodies” (postulate 23.3439 from the Legal Affairs Committee of the National Council [LAC-N])
- “De facto applicability of the too-big-to-fail regulations to large international banks” (postulate 23.3440 from the LAC-N)
- “Retroactive approval of the urgent guarantee credits for a federal default guarantee to the SNB and loss protection guarantee to UBS AG. Questions to be examined from the perspective of the Finance Committee of the Council of States” (postulate 23.3441 from the Finance Committee of the Council of States [FC-S])
- “Retroactive approval of the urgent guarantee credits for a federal default guarantee to the SNB and loss protection guarantee to UBS AG. Questions to be examined from the perspective of the Finance Committee of the National Council” (postulate 23.3442 from the Finance Committee of the National Council [FC-N])
- “Future of the Swiss financial centre” (postulate 23.3443 from the Economic Affairs and Taxation Committee of the National Council [EATC-N])
- “Review and adapt the too-big-to-fail regulations to the situation of a bank run and other circumstances” (postulate 23.3446 from the EATC-N)
- “Analysis of any decisive factors that may have led to the failure of Credit Suisse” (postulate 23.3447 from the EATC-N)

The postulates “Application of emergency law” (23.3438 from the LAC-N), “Merger of UBS and CS. Assessment of the significance for competition law and the economy” (23.3444 from the EATC-N) and “Review of the SNB’s toolkit” (23.3445 from the EATC-N), which were likewise referred by Parliament in the wake of UBS’s takeover of Credit Suisse, will be reported on separately by the Federal Council. Conclusions relevant to the financial centre have been taken into account in the follow-up work.

Other parliamentary procedural requests, including some that have not yet been conclusively dealt with in Parliament at the time of publication of this report, or are no longer relevant due to having been rejected by Parliament or withdrawn, are also addressed and dealt with in this report. They are also listed on p. 204.

– **Mandate pursuant to Article 52 BankA:**
  Every two years, pursuant to Article 52 of the Banking Act of 8 November 1934,[4] the Federal Council reviews the provisions for SIBs with regard to comparability and the degree of implementation of the corresponding international standards abroad. It submits a report to the Federal Assembly and indicates any need for amendments at the legislative and ordinance level. The fourth evaluation report was adopted by the Federal Council for the attention of Parliament on 4 June 2021.[5] In fulfilment of the aforementioned legislative mandate, this report also serves as the fifth issue of the Federal Council reporting exercise.

[4] SR **952.0**

[5] BI **2021** 1487

1.3 Demarcation from the PInC

On 8 June 2023,[6] Parliament decided to appoint a Parliamentary Investigation Committee (PInC) to investigate the management of the authorities in connection with the emergency merger of Credit Suisse with UBS. The subject of the parliamentary investigation is the management of the Federal Council, the Federal Administration and other bodies performing federal responsibilities in recent years in connection with the emergency merger of Credit Suisse with UBS, insofar as they are subject to overall supervision by Parliament. The legality, suitability and effectiveness of the activities of the aforementioned authorities and bodies – as well as their interaction with each other and with third parties – are to be investigated.

With regard to future adjustments to the TBTF regime, the results of the PInC – which are not yet available – will also have to be taken into account. This applies in particular to possible adjustments to the institutional framework that regulates the cooperation between and the roles of the authorities.

1.4 Approach

The work on this report was carried out under the direction of the FDF and with the involvement of the SNB, FINMA, the State Secretariat for Economic Affairs (SECO) and other units within the Federal Administration. The Federal Council Committee for Financial Matters, the Conference of Cantonal Directors of Finance and the Economic Affairs and Taxation Committees were each briefed at least twice about the status of the work and consulted. An exchange also took place with the Conference of Cantonal Directors of Economic Affairs.

The report is based on a large number of external assessments. These include:
- "The need for reform after the demise of Credit Suisse", report by the Expert Group on Banking Stability,[7]
- External expert opinions commissioned by the FDF (see p. 203),
- Peer review by the Financial Stability Board (FSB) on Swiss TBTF regulations,[8]
- "2023 Bank Failures: Preliminary lessons learnt for resolution", report by the FSB,[9]
- "Report on the 2023 banking turmoil" by the Basel Committee on Banking Supervision (BCBS).[10]

Assessments prepared independently by the SNB and FINMA were also taken note of. These include the SNB's Financial Stability Report 2023 and FINMA's report on "Lessons Learned from the CS Crisis".[11]

6 BBl **2023** 1369
7 Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023
8 FSB, Peer Review of Switzerland, 29 February 2024
9 FSB, 2023 Bank Failures: Preliminary lessons learnt for resolution, 10 October 2023
10 BCBS, Report on the 2023 banking turmoil, October 2023
11 SNB, Financial Stability Report 2023, June 2023. FINMA, FINMA Report: Lessons Learned from the CS Crisis, 19 December 2023

BANK

PART I:
BACKGROUND, NEED FOR ACTION AND RECOMMENDED MEASURES

2 Background

2.1 Importance of the Swiss financial centre and the TBTF issue

Banks, insurance companies, financial market infrastructures, asset managers and other financial service providers perform key functions for society and the economy. Consumption, trade, investment, risk protection and retirement provision would not be possible without a properly functioning financial sector.

Switzerland has a broad-based and internationally oriented financial centre. Part of this financial centre is an internationally significant banking sector. The sector is a global leader in cross-border wealth management and at the same time provides the Swiss population with financial services, in particular the deposit and loan business and payment transactions.

The banking sector is of great economic importance for Switzerland. It directly contributes about 5% of Swiss GDP, employed some 108,000 people in 2022, and generated corporate and income taxes of around CHF 9 billion in 2021.[12] Due to its economic interconnectedness, other industries also benefit from the Swiss financial sector, meaning that its economic importance goes far beyond these key figures.

In its financial centre strategy of 4 December 2020,[13] the Federal Council stated its ambition that the Swiss financial centre should continue to be one of the leading international financial centres. It considers stability and resilience to be indispensable cornerstones for an attractive, innovative, globally interconnected and sustainable financial centre.[14]

In an international comparison, the Swiss banking sector stands out due to its size relative to the overall economy and the dominance of a small number of banks. At the end of 2022, the assets of the entire banking sector amounted to about CHF 3,600 billion – more than four and a half times Switzerland's GDP. The assets of the five largest banks accounted for around 60% of that total. As at the end of 2023, the assets of the largest bank alone – UBS after the integration of Credit Suisse – amounted to over CHF 1,400 billion, around 180% of Swiss GDP (see Figure 2).

An important financial centre with internationally active banks brings significant advantages to Switzerland.[15] Large, globally oriented banks not only make a direct contribution to GDP, but also strengthen the provision of financial resources to the real economy. They offer a connection to global payment transactions, currency hedging, capital market services, export financing and support for company formation, IPOs and mergers. Large, internationally active banks also provide essential services for other banks in Switzerland, such as securities custody services and international currency settlement. Internationally active Swiss banks that offer these services make the real economy less dependent on the decisions of other jurisdictions and thus protect companies' access to these services.

However, as the size and complexity of banks increase, so do the risks in a crisis and therefore the requirements for regulation and supervision. Due to the size and international interconnectedness of the Swiss banking sector, the framework for ensuring financial stability is therefore of particular importance for Switzerland.

This applies in particular to the TBTF issue: in the event of a crisis at a SIB, there is a risk that systemically important functions will be disrupted and financial stability is no longer ensured. This means that a state can allow a SIB to fail only by accepting major economic costs. Because of this, over and above the requirements that apply to all banks, SIBs are subject to additional regulatory requirements, referred to as the TBTF regime.

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[12] SIF, Swiss financial sector: Key figures 2023, 1 May 2023

[13] Report of the Federal Council, Leading worldwide, rooted in Switzerland: Policy for a future-proof Swiss financial centre, 4 December 2020

[14] There are two implementation strategies for the financial centre strategy: 1) Report of the Federal Council, "Digital finance: areas of action 2022+", 2 February 2022, and 2) Report of the Federal Council, "Sustainable finance in Switzerland – Areas for action for a leading sustainable financial centre, 2022–2025", 16 December 2022. With its recommendation to adopt the motion "Strengthening the alignment of financial flows in accordance with the Paris Agreement" (23.3881 from National Councillor Andrey), the Federal Council fundamentally supports the strategy of addressing the climate compatibility of financial flows, beyond the TBTF issue

[15] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023

2.2 Overview of the TBTF regime

All banks in Switzerland are subject to comprehensive regulation and are supervised by FINMA. The regulation and supervision of financial markets in general and banks in particular aim to protect creditors and investors, as well as to ensure the proper functioning of the financial markets (see Art. 4 of the Financial Market Supervision Act of 22 June 2007[16], FINMASA).

Beyond this, an additional, specific TBTF regime applies to SIBs in Switzerland. It has three objectives as set out in Article 7 paragraph 2 BankA. The TBTF regime aims to:

(1) reduce risks to the stability of the Swiss financial system,
(2) ensure the continuation of economically vital functions and
(3) avoid state aid.

To achieve these objectives, the Federal Council and Parliament introduced special provisions for SIBs in the wake of the 2007-08 financial crisis. These provisions were drawn up based on the recommendations of the Commission of Experts of 30 September 2010[17] on limiting the economic risks posed by large companies. The provisions came into force for the first time on 1 March 2012[18] and have been further developed since then. Their introduction, regular review and further development were carried out in accordance with internationally recognised standards.

In a first step, SIBs are identified in accordance with the requirements set out by law. The systemic importance of a bank is assessed according to its size, interconnectedness with the financial system and the economy, and the substitutability at short notice of the services provided. Systemically important functions include, in particular, the domestic deposit and lending business as well as payment transactions (Art. 8 BankA). The SNB is responsible for designating systemically important banks. As of the end of 2023, UBS was classified as an internationally active SIB[19] and the Raiffeisen Group, PostFinance and Zürcher Kantonalbank (ZKB) as non-internationally active SIBs.[20]

SIBs must meet higher capital and liquidity requirements, as well as requirements relating to the preparation of recovery and resolution measures (see Box 1 for definitions of the individual terms). Recovery refers to measures taken by the bank with the aim of leading the bank out of a crisis as quickly as possible and without assistance. Resolution includes restructuring as a primary strategy – ordered by FINMA with the aim of continuing at least some business operations – and liquidation as a fallback option.

Specifically, the TBTF regime includes the following requirements:

- **Capital:** SIBs must hold more capital than other banks so that they can better absorb any losses on a going-concern basis (going-concern capital). These requirements must generally be met with Common Equity Tier 1 capital (CET1); a portion can also be met with Additional Tier 1 capital (AT1). In addition, SIBs must reserve loss-absorbing capital for the event of resolution (gone-concern capital).

  The increased going-concern and gone-concern requirements apply both to the risk-weighted requirements, which are expressed as a percentage of risk-weighted assets (RWA), and to the unweighted leverage ratio (LR). Both the risk-weighted and leverage ratio requirements also include progressive surcharges for the size and market share of a SIB.

- **Liquidity:** Compared to the other banks, SIBs must hold additional liquidity to absorb liquidity shocks and to cover liquidity requirements for restructuring or liquidation. In addition to the SIB's own funds, the SNB, as lender of last resort (LoLR), can provide banks with emergency liquidity assistance (ELA) in a crisis. Previously, the provision of liquidity against mortgage collat-

[16] SR **956.1**

[17] Commission of Experts for limiting the economic risks posed by large companies, Final report, 30 September 2010

[18] AS **2012** 811

[19] Under Art. 124*a* of the Capital Adequacy Ordinance (CAO) of 1 June 2012 (SR **952.03**), *internationally active SIBs* is used for those designated as G-SIBs by the FSB. If a SIB is removed from the FSB list, FINMA may continue to designate it as an internationally active SIB. Credit Suisse and UBS were added to the list of global important financial institutions by the FSB and BCBS in 2011. Following its formal takeover by UBS in June 2023, Credit Suisse was removed from the FSB and BCBS lists and from the list of SIBs in Switzerland. See FSB, 2023 List of Global Systemically Important Banks (G-SIBs), 27 November 2023

[20] The definition of SIBs is based on their national importance. With the exception of ZKB, cantonal banks are therefore not covered. However, due to their high regional importance, it can be assumed that the distress and in particular the failure of a cantonal bank may be critical for its subsidising cantons (see also chapter 6)

eral under ELA was intended only for SIBs. This option will now be expanded to cover all banks as part of an initiative launched by the SNB in 2019.[21] The Federal Council has also proposed a public liquidity backstop (PLB) as a future additional element, which would be available as a possible source of liquidity in addition to ELA in the event of the resolution of a SIB under certain conditions.

- **Recovery planning:** In a recovery plan, SIBs must set out the recovery measures they intend to apply in a crisis so as to ensure that they can continue operating without the need for state intervention. FINMA assesses and approves the recovery plan.

- **Resolution planning (restructuring or liquidation with emergency plan):** For each SIB, FINMA sets out in a resolution plan how a restructuring or liquidation ordered by FINMA can be carried out. SIBs provide FINMA with the necessary information on an annual basis. In the case of restructuring, the focus is on the at least partial continuation of the bank's business operations. FINMA can convert certain creditors' claims into equity of the bank (bail-in).

  If there is no reasonable prospect of restructuring or if restructuring is not successful as the primary resolution strategy, FINMA will initiate a liquidation with the aim of satisfying all creditors equally in accordance with their ranking. In this case, emergency planning also comes into play. As part of resolution planning, SIBs must therefore demonstrate with an emergency plan that they can continue their respective systemically important functions in a crisis without interruption.

Figure 1 shows the instruments, broken down by phase of the crisis from normal business operations to the resolution of a SIB. In an actual crisis, the instruments do not necessarily have to be applied in the sequence shown; for example, liquidation can in principle also take place without prior restructuring.

The preventive instruments take effect during normal business operations. In addition to capital and liquidity, these include FINMA instruments such as fit and proper assessments, more intensive supervision of identified risks at a bank and, if necessary, proceedings against the bank or its bodies to enforce supervisory legislation. The recovery phase refers to the period between normal business operations and FINMA's interventions in the resolution phase.

[21] See, for example, the speech by Schlegel, A pillar of financial stability – The SNB's role as lender of last resort, 9 November 2023

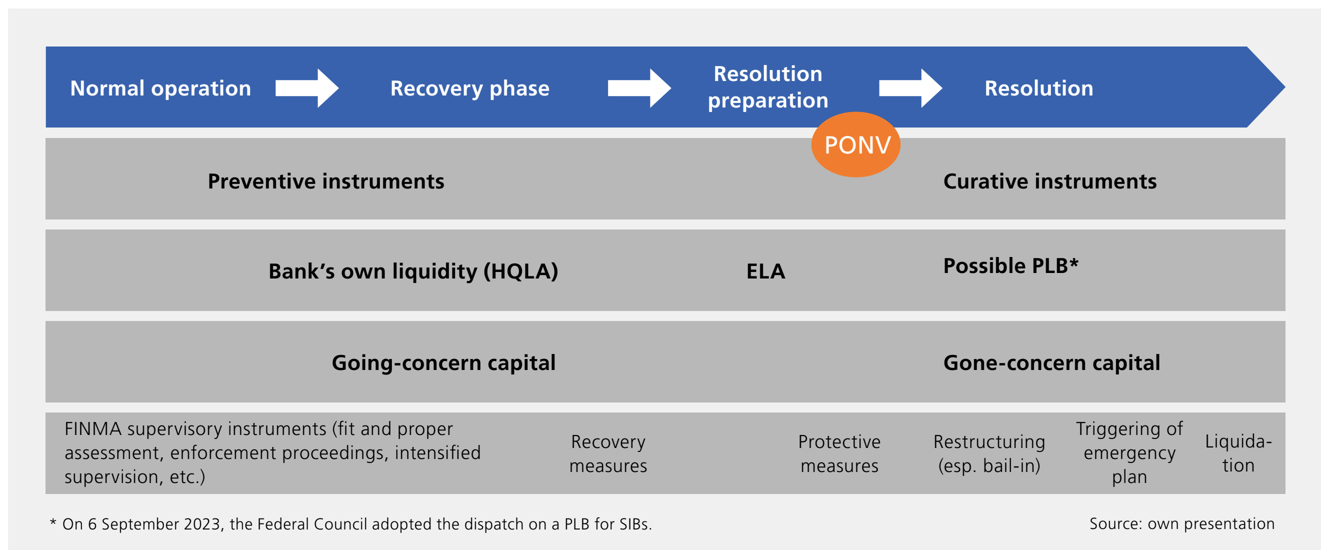

Figure 1: Exemplary illustration of instruments organised by crisis phase

Box 1: Recovery, resolution, restructuring, emergency plan – selected terms

- **Recovery:** Recovery refers to measures taken by SIBs to ensure that the bank can extricate itself from a crisis as quickly as possible and without assistance. For this purpose, each SIB draws up a **recovery plan,** which must be approved by FINMA.
- **Resolution:** Resolution covers both the restructuring of a SIB (see on the right) and, as a fall-back option, the liquidation of the SIB with activation of its emergency plan (see on the right). For this purpose, FINMA draws up a **resolution plan** for each SIB in which it shows how a restructuring or liquidation ordered by FINMA can be carried out.
- **Restructuring:** Restructuring is the primary procedure for resolution. It is a restructuring of a bank ordered by FINMA with the aim continuing at least part of the bank's business operations.
- **Emergency plan:** SIBs draw up a Swiss emergency plan, which is part of resolution planning. In this plan, SIBs show how they can continue to perform the systemically important functions for Switzerland (in particular access to deposits and payment transactions) without interruption in the event of a crisis.

2.3 Effect of the TBTF regime in the case of Credit Suisse

The TBTF rules introduced in 2012 and gradually refined since then have strengthened the resilience of SIBs in particular. The increased resilience was demonstrated, for example, in the challenging economic environment during the Covid-19 pandemic or in autumn 2022 in the case of Credit Suisse.

In March 2023, Credit Suisse was in such an acute crisis of confidence that it would have gone into disorderly bankruptcy on 20 March 2023 without countermeasures from outside the bank (see chapter 5 for a detailed description). On 16 and 19 March 2023, the Federal Council adopted a package of measures that prevented this from happening and enabled the takeover of Credit Suisse by UBS – and thus a rapid stabilisation of the financial markets.

The package of measures adopted by the authorities included a federal guarantee to the SNB to secure liquidity assistance loans to Credit Suisse in the maximum amount of CHF 100 billion and a federal loss protection guarantee to UBS in the amount of CHF 9 billion in the event that a loss of more than CHF 5 billion were to occur on a certain portfolio of assets to be wound up that UBS took over from Credit Suisse. The SNB supported the takeover with extensive liquidity assistance of up to CHF 168 billion. This liquidity assistance was provided in Swiss francs, US dollars and euros.

The combination of the takeover by UBS and the accompanying state measures succeeded in stabilising the financial system quickly and sustainably. The chosen package of measures thus had the desired effect. This was also recognised internationally. However, it meant that the solution chosen in this Credit Suisse crisis differed from the solution of implementing the prepared resolution strategy. This has raised critical questions about the TBTF rules at national and international level.

Although the criticism voiced by some that the TBTF rules proved ineffective in this crisis is not surprising against the background described above, the Federal Council believes that the criticism falls short for several reasons:

- Firstly, in a crisis it is always important to choose the most suitable course of action under the specific circumstances – regardless of how much time and effort have been put into preparing the individual options. If required by the circumstances, it may ultimately also be necessary to deviate from prepared legislative options. The mere availability of different options that can be weighed up against each other in terms of their prospects of success and impact is extremely valuable in any crisis. This was also the case in the Credit Suisse crisis.

- Secondly, the existing TBTF regime described above, which is not limited to resolution planning, contributed significantly to the chosen solution. This effect is described in more detail below.

- Finally, an important side effect of TBTF regulations is that the incentives of the capital requirements contributed to the reduction in size of the two G-SIBs since the 2007-08 financial crisis (see Figure 2). Compared to Swiss GDP, total assets are now significantly lower than they were during the financial crisis. This also applies to the new UBS, even though it has grown significantly again with the takeover of Credit Suisse. The reduction in the size of Credit Suisse at least tended to contribute to successful crisis management, even if total assets are neither the only nor the decisive factor in a crisis.

Specifically, the effect of the existing TBTF regime in the Credit Suisse crisis can be assessed as follows:

- **Capital:** The capital requirements have strengthened the resilience of SIBs. This also applied to Credit Suisse, which would have been able to handle far fewer setbacks without the additional capital requirements. As outlined above, the progressive capital requirements are also likely to have contributed to Credit Suisse significantly reducing its total assets.

  Another instrument of the TBTF regime introduced internationally and in Switzerland that was used during the crisis was the write-down of AT1 instruments by Credit Suisse. This was absolutely necessary for the recovery of Credit Suisse and thus for the successful implementation of the chosen solution. In addition, based on the contractual provisions in these bonds – as provided for in the Basel Committee's standards and the Swiss legal framework – private creditors also participated in crisis management in view of the state support provided.

  If the takeover by UBS had not been feasible or that the authorities had deemed restructuring to be a more viable option, capital in the amount of around CHF 55 billion would also have been available thanks to the requirements for the event of resolution.

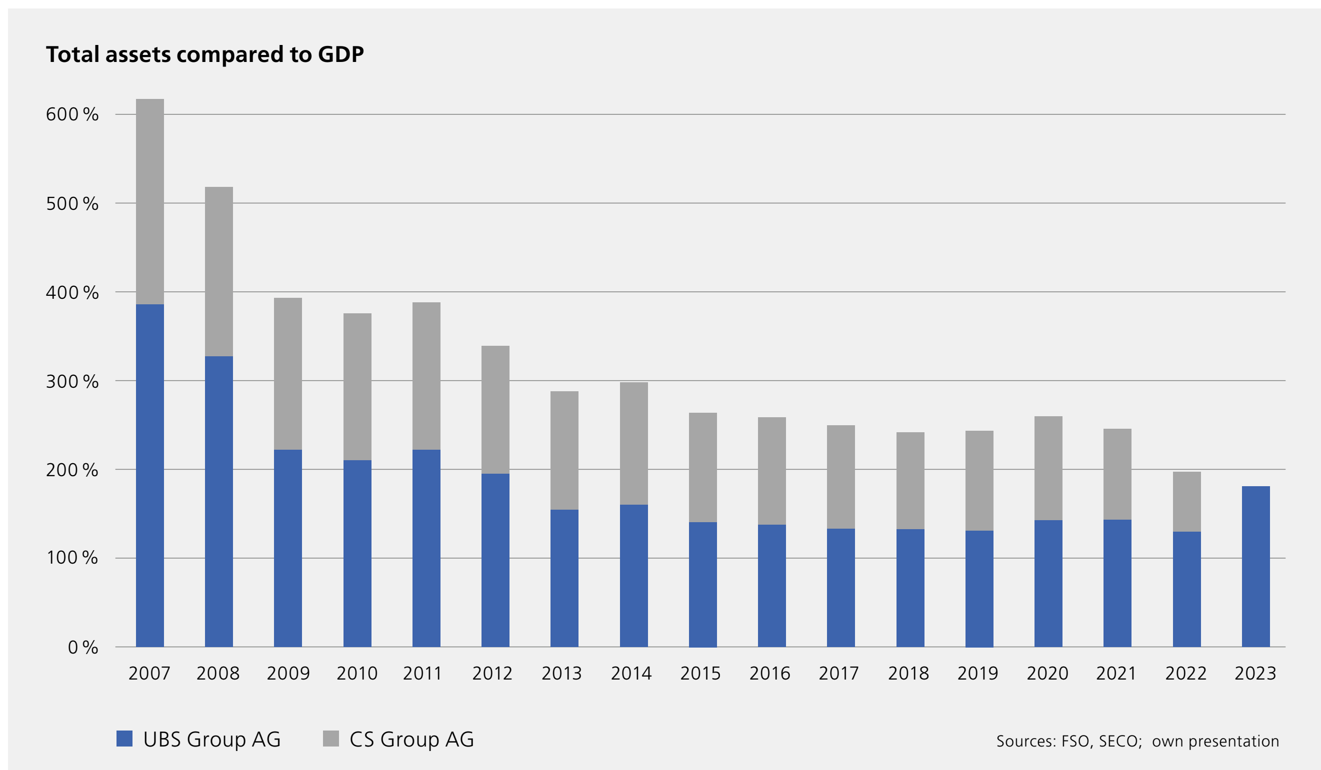

Figure 2: Development of the size of Swiss G-SIBs compared to GDP

Moreover, the existing TBTF capital requirements mean that the enlarged UBS will now also have to meet higher capital requirements in proportion to the size of its balance sheet.

The assessment also reveals weaknesses, however. The capital requirements are fundamentally not forward-looking in nature. In addition, the capitalisation of the parent bank[22] – Credit Suisse AG – proved to be a critical point that significantly limited Credit Suisse's room for manoeuvre.

Furthermore, while the AT1 capital instruments were able to fulfil their intended role under the contractual provisions and in accordance with Swiss law and international standards by being written down in the context of the state support, the question arises as to why they were not able to assume their intended loss-absorbing role on a going-concern basis earlier in the crisis (see section 7.5.7).

- **Liquidity:** In the area of liquidity, the resilience of SIBs has improved significantly, in particular due to the additional measures ordered by FINMA. In this way, for example, Credit Suisse was able to absorb even the unprecedented outflow of customer deposits amounting to CHF 138 billion in the fourth quarter of 2022.[23]

However, there are also important findings relating to liquidity. On the one hand, the scale and speed of outflows resulting from the massive loss of confidence in Credit Suisse exceeded previous experience and, following a further acceleration in March 2023, led to the imminent inability of the bank's to meet its payment obligations.

During crisis management, it also became clear that the SNB's emergency liquidity assistance was far from sufficient. Additional state liquidity assistance therefore had to be provided under emergency law. The PLB instrument, whose introduction the Federal Council had

[22] On the term parent bank, see Box 3

[23] Credit Suisse Group AG, Annual Report 2022, pp. 67 and 276

already proposed before the crisis, likewise proved its necessity and usefulness. For the assessment, see chapters 8 to 10.

- **Recovery planning and implementation:**
  Credit Suisse had drawn up a recovery plan as provided for in the regime. This formed the basis for measures for the bank to recover without assistance in the event of a crisis.

  There is still room for improvement in the area of recovery planning and implementation, however. The implementation and effect of this element of the TBTF regime during the crisis must be viewed critically – at least in the specific case of Credit Suisse. The recovery measures taken by the bank were far from sufficient.

  Reasons included the lack of preparation of the implementation and the insufficient impact of the individual implemented measures on the liquidity and capital situation. Finally, there was both a lack of willingness on the part of Credit Suisse's management to activate the recovery plan in its entirety and a lack of powers on the part of FINMA to enforce such an activation. Last but not least, the top management bodies lacked insight into the bank's actual situation or the willingness to act on the basis of such insight. The interests of management, creditors and the authorities in the continued existence of the bank and the attitude towards the measures to be taken were not congruent during this phase of the crisis. For the assessment, see chapter 12.

- **Resolution planning (restructuring or liquidation with emergency plan):** In the event of a crisis, the TBTF regime provides, as one option, for the restructuring of the affected SIB. In the case of Credit Suisse, restructuring was indeed one of the options on the weekend of 18 and 19 March 2023. Credit Suisse would have had to be restructured on the basis of the restructuring plan drawn up by FINMA, and the business model would have had to be realigned. The activation of the emergency plan for the Swiss subsidiary combined with the bankruptcy of Credit Suisse Group was also considered as a fall-back option in principle (see section 5.4).

  In the specific situation in mid-March 2023, the authorities involved considered that a restructuring procedure entailed considerable disadvantages and risks compared to the solution that was ultimately implemented. The unprecedented loss of confidence with regard to Credit Suisse was so extensive that it was highly questionable whether another capital increase together with the announcement of a further repositioning could have restored the necessary confidence.

  Although resolution did not take place in the case of Credit Suisse, the crisis has led to important insights in this regard. In particular, the Credit Suisse crisis has made it clear that the chances of success of a prepared resolution strategy vary depending on the crisis scenario. In addition, there are considerable uncertainties and risks associated with resolution (see sections 5.4 and 13).

3 Need for action

3.1 Appraisal of fundamental issues relating to the TBTF regime

3.1.1 Principles

According to the Federal Council's financial centre strategy of 4 December 2020, [24] the Federal Council's wish for the Swiss financial centre to remain one of the leading international financial centres is still valid. In particular, in this report the Federal Council reaffirms the objective set out in the financial centre strategy that Switzerland should be an attractive location for globally active financial institutions (see section 2.1). The report therefore focuses on an optimal regulatory framework and optimal supervisory instruments to strengthen stability and resilience as crucial cornerstones for an innovative, globally interconnected and sustainable financial centre.

For this purpose, the Federal Council seeks to strengthen and refine the TBTF regime on the basis of the assessments set out in this report. The primary aim is to achieve a strengthening of accountability (of banks, bank bodies, but also bank customers) and not greater reliance on the state, in particular in the form of state aid.

The financial centre should primarily be based on the accountability of financial institutions, their bodies, investors and customers. However, the more serious the impact of a financial institution's business failure on financial stability, the economy and taxpayers, the more relevant the subsidiary role of regulation and supervision becomes.

The recommended strengthening and further development of the TBTF regime should be proportionate and effective (see section 4.1). The TBTF regime should continue to be as practicable and internationally comparable as possible.

Finally, it must be noted that no expansion of regulatory requirements can completely prevent crises. Crisis situations are unpredictable – they cannot be anticipated in every detail. Even a further strengthening of the TBTF regime cannot prevent every eventuality.

Switzerland pursues a liberal, principles-based approach to regulation. This liberal approach is supplemented by the possibility of using emergency law to resolve unforeseeable individual cases. This creates the ability to act in a crisis and makes targeted, optimal solutions possible on a case-by-case basis.

Provisions should be made in ordinary law to deal with crises (crisis-proof legislation). At the same time, however, instruments will also be needed that give the executive branch leeway when reacting to crises. Accordingly, the possibility for the Federal Council to act in the interests of the country and on the basis of the Federal Constitution under emergency law in specific crisis situations cannot and should not be ruled out categorically, even if the Federal Council should refrain from using emergency law in principle and whenever possible.

3.1.2 Objectives of the TBTF regime

The Federal Council still considers the existing objectives of the TBTF regime (see section 2.2) – in particular the reduction of risks for the Swiss financial system, the safeguarding of SIBs' economically important functions and the avoidance of state aid – to be important and suitable.

The Credit Suisse crisis has made clear, however, that contradictions between the objectives exist in the event of a crisis. In particular, in the event of a crisis there may be a conflict of objectives between, on the one hand, maintaining financial stability and continuing economically vital functions (and as such avoiding very high costs for taxpayers) and, on the other hand, avoiding state aid. In the Credit Suisse crisis, compromises were made on the third objective in order to achieve the first and second objectives. The reason for doing so was that providing state aid in the form of risk guarantees in a crisis – for the purpose of establishing stability and confidence – can be crucial in avoiding serious economic consequences.

Nevertheless, the third objective – avoiding state aid – should be retained as an important policy principle. Any risks for taxpayers must be minimised, as must false incentives which encourage excessive risk-taking due to explicit or implicit guarantees (moral hazard).

Overall, the report accordingly confirms the objectives of the existing TBTF regime.

[24] Report of the Federal Council, Leading worldwide, rooted in Switzerland: Policy for a future-proof Swiss financial centre, 4 December 2020

3.1.3 Systemic importance

TBTF regulations are based on an appropriate definition of systemic importance and, pursuant to that definition, the criteria for the designation of SIBs. In light of the fact that the US banking crisis in 2023 has shown that the failure of non-systemically important banks can likewise trigger financial stability concerns in the event of a crisis, the question arises as to whether the current definition of systemic importance and the criteria for the designation of SIBs are still appropriate. In its assessment in chapter 6, the Federal Council concludes that there is no need for adjustment in this regard.

3.1.4 Conclusion

Based on the comprehensive review carried out in the report, the Federal Council has come to the following conclusions regarding the fundamental issues in connection with the TBTF regime:

- The Federal Council's existing financial centre strategy is still valid (see sections 2.1 and 3.1.1).
- The objectives of the TBTF regime are confirmed and should remain unchanged (see sections 2.2 and 3.1.2).
- The definition of systemic importance and the criteria for the designation of SIBs pursuant to Articles 7 and 8 BankA are also confirmed. They should remain unchanged (see sections 3.1.3 and 6).

These findings are central to the future direction of TBTF regulations.

3.2 Focus areas and derivation of fields of action

Based on the comprehensive review and the experience gained from the Credit Suisse crisis, the Federal Council sees a clear need for action to strengthen and further develop the TBTF regime in three focus areas:

Firstly, the *regime in the area of prevention* must be further strengthened in order to further reduce the likelihood of a banking crisis. Requirements for SIBs should therefore be tightened where appropriate, and their enforcement and supervision improved.

Secondly, the *regime in the area of liquidity* in a crisis must be further strengthened. The Credit Suisse case has underlined the preeminent importance of liquidity provision in the event of a crisis. It also witnessed liquidity outflows on a previously unseen scale and with unprecedented speed, which must be taken into account in the TBTF regime.

Thirdly, the *crisis management toolkit* must be expanded. A crisis can never be ruled out entirely. The solution chosen in the case of Credit Suisse, namely the takeover by a Swiss bank, would most likely no longer be available in the event of distress at UBS. In addition, given that the resolution of Credit Suisse as provided for in the TBTF regime was not applied, credibility as regards the viability of these plans must be strengthened.

The following sections expand on these three focus areas and describe six fields of action identified by the Federal Council.

While this report concentrates on SIBs and the TBTF regime, the scope of application is assessed, justified and defined separately for all measures.

3.2.1 Strengthening the regime in the area of prevention

The Credit Suisse crisis was the result of repeated incidents and irregularities at the bank, which dragged on for several years despite intensified supervisory and enforcement activities by FINMA, ultimately leading to the bank's inability to avert bankruptcy without assistance in March 2023.

While capital and liquidity requirements increase the resilience and stability of a SIB, they are not sufficient on their own to prevent a crisis. In addition to fulfilling these and other regulatory requirements, SIBs must in particular also take responsibility for their long-term orientation (e.g. in terms of strategy, corporate governance and corporate culture). This accountability should be demanded through clear requirements in the area of corporate governance and the enforcement of those requirements by the supervisory authority.

A first and fundamental focus area is therefore to reduce the likelihood of a SIB falling into a critical situation due to mismanagement. To strengthen prevention, the Federal Council has identified three fields of action:

- **Field of action 1: corporate governance and supervision.** Firstly, corporate governance, especially of SIBs, should be promoted and FINMA's supervision strengthened. On the one hand, this would help to achieve appropriate, responsible risk management. On the other hand, this would give FINMA clearer responsibilities and powers to intervene effectively. Measures to this effect could also have been useful in the Credit Suisse case. They are geared towards the long-term development of banks.

- **Field of action 2: capital requirements.** Secondly, the capital requirements and thus the capital base of SIBs should be strengthened quantitatively and qualitatively through targeted adjustments. In particular, weaknesses that became apparent during the Credit Suisse crisis should be remedied in a targeted manner. For this purpose, the capital requirements should be implemented more strictly and tightened for SIBs in a targeted manner. Moreover, forward-looking elements should be introduced in the institution-specific capital surcharge (Pillar 2). The requirements should continue to be based on international rules and international practice, with a careful weighting of the stability and competitiveness achieved. The special situation of Switzerland with one very large G-SIB compared to GDP must be taken into account.

- **Field of action 3: early intervention and recovery.** Thirdly, the possibilities and responsibilities of FINMA and the applicability of FINMA measures with respect to early intervention should be strengthened, and the measures to be taken for the recovery of SIBs should be expanded. Timely and targeted measures on a going-concern basis should be capable of bringing about the recovery of a distressed bank. If necessary, FINMA should be able to intervene at an early stage and enforce the necessary measures.

When adapting regulations to strengthen supervision and early intervention by FINMA, any assessments by the PInC of the extent to which the existing legislative basis has already been exhausted will also have to be taken into account.

3.2.2 Strengthening the regime in the area of liquidity

A second focus area concerns how to deal with the scale and speed of possible liquidity outflows in a crisis. Banks are susceptible to liquidity crises due to their maturity transformation function, in which they accept short-term deposits and grant longer-term loans.

The liquidity outflows in autumn 2022 and spring 2023, both at Credit Suisse and in the US banking sector, took on a new dimension in terms of both scale and speed. The high speed, huge reach and not always fact-based dissemination of information via digital channels, coupled with the possibilities of digital banking, increase the central importance of strong confidence in the banking system and sufficient liquidity provision as an essential element. The TBTF regime will have to take greater account of scenarios with extremely high and rapid liquidity outflows. The fourth field of action derives from this.

- **Field of action 4: ensuring liquidity in a crisis.** The aim is therefore to substantially expand the liquidity levels of SIBs and the banking sector as a whole in the event of a crisis.

The first line of defence is to strengthen the banks' own sources of liquidity. This is already being implemented on the basis of the special liquidity requirements for SIBs adopted by the Federal Council in June 2022, which must be met in full by the end of 2024.[25] Due to recent experiences with high liquidity outflows, the liquidity ratios and requirements used globally must also be reviewed and adjusted at international level. As a second of defence, the potential for liquidity provision via the SNB as lender of last resort must be significantly expanded, and, as a third line of defence, the option of the state ensuring liquidity in the form of a PLB must be introduced in ordinary law.

Ensuring sufficient liquidity is indispensable for overcoming a crisis. At the same time, it also has a preventive effect. The more credibly the market perceives that the necessary liquidity can be guaranteed in a crisis – in particular through the bank's own sources of liquidity, but also through the central bank and, in an emergency, a PLB – the greater the confidence in the bank. This in turn reduces the likelihood of occurrence or the magnitude of a crisis.

3.2.3 Expansion of the crisis toolkit

The risk of insolvency of a SIB can never be ruled out entirely. In the event of a crisis, SIBs must be able to exit the market in an orderly manner – this is central to the functioning of a market. As a further conclusion, the Federal Council is therefore also of the view that resolution planning and good crisis organisation by the authorities remain central and indispensable crisis management instruments that need to be strengthened. This gives rise to the following field of action:

- **Field of action 5: resolution planning.** The instruments and options in resolution planning should be expanded in order to further improve preparations for restructuring or bankruptcy liquidation with the continuation of systemically important functions in accordance with emergency planning.

To further improve resolution planning – and thus the resolvability of a SIB – the potentially significant risks associated with a resolution, including legal risks at both international and national level, should be further reduced. In addition, the options available for resolution should be expanded and resolution strategies tailored to various crisis scenarios should be prepared.

Finally, the following field of action was identified:

- **Field of action 6: crisis organisation and cooperation between authorities.** The crisis organisation and the cooperation between the authorities should also be strengthened.

In the view of the Federal Council, the crisis organisation in the Credit Suisse case worked in principle, leading to a solution that quickly stabilised the situation. Nevertheless, with regard to future crises and taking into account an international comparison, it makes sense to examine whether and to what extent the roles and responsibilities should be further clarified and the institutional structure and allocation of responsibilities, cooperation and decision-making, in particular among FINMA, the SNB and the FDF, should be regulated more clearly and efficiently. The findings of the PInC will have to be taken into account in this regard.

[25] AS 2022 359

4 Proposed package of measures

4.1 Criteria and overview of measures

The Federal Council proposes the package of measures outlined below. The choice is based on the following key criteria:

- Effectiveness: The measures should be effective and make a key contribution to strengthening financial stability, not only retrospectively in relation to the recent crisis but also in a range of scenarios. In particular, they should safeguard the stability of the Swiss financial centre, this quality being one of its strengths.
- Proportionality: The measures must be suitable and necessary to achieve the objectives and should strike a favourable balance between the desired effect on financial stability and the degree of encroachment on the economic freedom of the institutions concerned.
- Focus: The proposed measures should be tailored to the TBTF issue as precisely as possible and only affect other institutions besides SIBs if this is appropriate for meaningful implementation, e.g. in relation to competitiveness or the general strengthening of stability of the banking or financial sector. Unwanted side effects should be avoided. No measure is aimed at any sector other than the financial sector.
- Embedding in the international context: The measures should be embedded in the international context and take account of, or even advance, international work.

The following sections summarise the measures proposed by the Federal Council in the six fields of action. Table 1 provides an overview of the measures examined in detail in the report, although not all of them are recommended for implementation. The table also contains the following information in particular:

- Proposal on implementation: yes, examine, no. Some of the measures examined are recommended for immediate implementation. Others appear sensible but require in-depth examination, e.g. taking into account any results of the PInC or work and cooperation at international level. Other possible measures are not recommended for implementation, based on the comprehensive assessment in this document.
- Proposal on the scope of the measures: SIBs, all banks, all financial institutions. While most of the measures are aimed specifically at SIBs, some apply to the entire banking sector or even other financial institutions. This is the case where the measures strengthen the stability of the financial centre as a whole, taking into account the above criteria, or where restricting them to SIBs would be inappropriate and hard to justify (e.g. authority to impose fines).
- Level of implementation: act, ordinance, international standards. The measures indicated by “act” require changes at the legislative level. For measures at ordinance level, the process is less complex and they can therefore be implemented more quickly. In the case of measure 12, the implementation level is an expectation of the Federal Council in relation to FINMA and does not therefore involve any change to the regulatory framework. With some measures, it makes sense to take them forward at international level. These are set out in Box 2.

For more information on all the measures assessed, including other measures not recommended for implementation, please refer to the corresponding chapters in Part II of the report.

	No.	Measure	Proposal on implementation	Scope	Level	Section
Corporate governance & supervision	1	Define in more detail **corporate governance** requirements by strengthening the legal basis (e.g. on requirements for the board of directors and responsibility for corporate culture)	Yes	SIBs Examine for other banks	Act	15.2.4
	2	Introduce a **senior managers regime** to ensure a clearer assignment of responsibilities (proportional implementation: at least for the board of directors and executive board, possibly also for other levels)	Yes	SIBs Examine for other banks	Act	15.3.4
	3	Strengthen the legal basis and requirements for **remuneration systems**, especially on the design of variable remuneration, clawbacks and retention periods	Yes	SIBs Examine for other banks	Act	15.4.4
	4	Introduce **pecuniary administrative sanctions** by FINMA for supervised legal entities	Examine	Financial institutions	Act	16.3.4.1
	5	Introduce comprehensive **public disclosure** on supervisory procedures	Yes	Financial institutions	Act	16.2.4
	6	Align the prohibition from practising a profession **(industry ban)** with the prohibition from performing an activity (activity ban) and extend the existing instrument of **disgorgement of profits** to other natural persons	Yes	Financial institutions	Act	16.4.1.4 and 16.4.2.4
	7	Enshrine proper business conduct requirements for institutions at the legislative level and strengthen the legal basis covering **changes in management bodies**	Yes	Banks	Act	16.4.3.4
	8	Make it easier for FINMA to obtain information by extending the **duty to provide information and to report**	Yes	Financial institutions	Act	16.4.4.4
	9	Strengthen **enforcement of supervision** by shortening the **duration of procedures** (e.g. immediate enforceability of FINMA rulings)	Examine	SIBs	Act	16.6.4
	10	Strengthen dual supervision through stricter requirements around the **use of audit firms** (e.g. independence requirements and direct awarding of mandates)	Examine	Financial institutions	Act	16.5.4
	11	Abolish dual supervision (no **use of audit firms** and expansion of FINMA)	Examine	SIBs	Act	16.5.4
	12	Ensure adequate **resourcing of FINMA** (within the framework of the existing funding structure and taking into account the PInC findings)	Yes	FINMA	Federal Council expectation of FINMA	16.8
	13	Adapt FINMA Board of Directors' responsibility for **matters of substantial importance**, taking into account the PInC findings	Examine	FINMA	Act	16.7.3

Table 1: Package of measures

	No.	Measure	Proposal on imple-mentation	Scope	Level	Section
Capital requirements	14	Introduce **forward-looking elements** into the institution-specific capital surcharge (Pillar 2) (based in particular on stress tests; examine how best to disclose the results)	Yes	SIBs	Ordinance	7.5.2
	15	Strengthen the **capital requirements for foreign participations** – and thus for parent banks – within a financial group	Yes	SIBs	Ordinance	7.5.1
	16	Increase the **progressive component of capital requirements** (for both the leverage ratio and the RWA ratio)	No	SIBs	Ordinance	7.5.4
	17	Generally increase capital requirements by means of a higher **leverage ratio**	No	SIBs	Ordinance	7.5.3, 7.5.5
	18	Tighten regulatory requirements regarding the prudent **valuation** and the recoverability of certain **balance sheet items**	Yes	Banks	Ordinance	7.5.6
	19	Strengthen the risk-bearing function of **AT1 capital instruments** on a going-concern basis (e.g. clear criteria for suspending coupon payments)	Yes	Banks	Ordinance/ Interna-tional standards	7.5.7
	20	Abolish **AT1 capital instruments**, or only allow conversions and no write-off instruments at the regulatory level	No	Banks	Ordinance	7.5.7
	21	Maintain the exemption of TBTF capital instruments from **withholding tax**	Yes	SIBs	Act	7.5.8
Early intervention & recovery	22	Strengthen **early intervention** by the supervisory authority by legally enshrining the relevant measures, applicability and timing	Yes	Banks	Act	12.4.2
	23	Strengthen **recovery planning** through clearer regulatory requirements and criteria	Yes	SIBs	Ordinance	12.4.1
Ensuring liquidity during a crisis	24	In the work on international standards, advocate a critical review of **liquidity requirements** (LCR, NSFR) for all banks	Yes	Banks	Interna-tional standards	8.5.1
	25	Tighten requirements regarding the **provision of information** about the liquidity situation to the supervisory authority	Yes	Banks	Ordinance	8.5.3
	26	Introduce regulatory **restrictions on deposit withdrawals** by bank customers	No	Banks	Ordinance	8.5.1
	27	Facilitate the diversification of funding sources by introducing a **Covered Bond** Act, taking the impact on the LoLR and PLB into account	Examine	Banks	Act	8.5.2
	28	With a view to significantly expanding the potential for liquidity provision via the **LoLR**, review and, if necessary, adapt the legal framework, including the introduction of requirements for banks to prepare collateral	Yes	Banks	Act	9.4
	29	Introduce a **PLB** instrument for SIBs in ordinary law	Yes	SIBs	Act	10.4.1
	30	Expand and strengthen **depositor protection** (e.g. by raising deposit insurance limits, introducing subsidiary state guarantees)	No	Banks	Act	11.4

Table 1: Package of measures

	No.	Measure	Proposal on implementation	Scope	Level	Section
Resolution planning	31	Expand **resolution options** (e.g. "orderly wind-down")	Yes	SIBs	Act	13.4.1
	32	Introduce a regulatory requirement for a **parent bank resolution plan**	Yes	SIBs	Act	13.4.2
	33	Increase legal certainty of a **bail-in**, or advocate this, especially at international level	Yes	SIBs	International standards	13.4.4
	34	Create a **resolution fund** to finance resolution	No	SIBs	Act	13.4.6
	35	Introduce a legal basis for **temporary public ownership (TPO)** as an "ultima ratio" instrument	No	SIBs	Act	13.4.5
	36	Introduce fundamental **restrictions on the group structure of banks** (e.g. a segregated banking system or size restrictions)	No	Banks	Act	14.4.3, 14.4.4
Crisis organisation & cooperation	37	Optimise **responsibilities, competencies and cooperation between authorities** in a crisis	Examine	FINMA, SNB, FDF	Act	17.4

Table 1: Package of measures

Box 2: Measures to be implemented at international level

Based on the Credit Suisse experience and the latest assessments, Switzerland will also work internationally to further develop standards. This box outlines the measures concerned.

Capital requirements: In the framework of the BCBS, efforts should be made to i) strengthen the loss-bearing function of AT1 going-concern capital, and ii) create more transparency regarding the capitalisation of parent banks.

Liquidity requirements: In the framework of the BCBS, Switzerland should work to ensure that the liquidity ratios take account of the lessons learned from the 2023 banking crisis. The liquidity standards should be adapted in order to strengthen a bank's resilience during a crisis (LCR) and enhance the stability of the funding structure (NSFR).

- **LCR:** In particular, the assumed outflow factors should be tightened and the LCR's buffer function strengthened.
- **NSFR:** The weighting factors for available stable funding in relation to customer deposits should be adapted in order to incentivise maturity extensions and stable deposits.

Resolution: The internationally applicable standards and the design of legal systems in relevant jurisdictions are key to the successful implementation of a G-SIB bail-in. The legal certainty of a bail-in should therefore be increased, both within the FSB and through bilateral coordination. In particular, i) the cross-border issue in the event of a bail-in should be mitigated and ii) transparency regarding the ownership of bail-in bonds should be enhanced. Bail-in bonds are debt instruments issued for the specific purpose of absorbing losses in the event of a bail-in.

Switzerland agrees in principle with the follow-up work proposed by the FSB in the wake of the March 2023 crisis and will prioritise this in its work in the FSB.

4.2 Measures by field of action

The numbering of measures refers to Table 1. For each measure, the last column in the table refers to the section containing the underlying assessment in Part II of the report.

4.2.1 Corporate governance and supervision

4.2.1.1 Background and objectives

As the recent banking crises have made clear, deficiencies in corporate governance, particularly in risk management and corporate culture (e.g. excessive risk appetite or lack of a culture of responsibility/accountability), can be key causes of banking crises.

Definition of and compliance with corporate governance principles is the responsibility of the firm's management. Responsible and exemplary corporate behaviour based on a long-term mindset cannot and should not have to be guaranteed by regulation and supervision. However, the more serious the impact of a financial institution's failure on financial stability, the economy and taxpayers, the more important the subsidiary role of regulation and supervision becomes. In the Credit Suisse case, it became apparent that FINMA was not able to prevent deficiencies in corporate governance, or was not able to do so sufficiently effectively. Moreover, it can take several years to complete the legal process for reviewing FINMA's decisions.

Against this backdrop, incentives for good corporate governance should be strengthened, particularly for SIBs, by assigning responsibilities more clearly and redesigning the requirements for remuneration systems. The supervisory authority should be strengthened and its enforcement powers increased, so that it can demand accountability, better influence the risk culture of banks, and prevent or sanction misconduct more effectively. Detailed assessments of these topics can be found in chapters 15 and 16.

Proportionality must be considered during implementation, with the requirements differing substantially depending on banks' size, complexity and risk profile.

4.2.1.2 Proposed measures

Measure 1: Define the corporate governance requirements for SIBs, and potentially all banks, in more detail.
This will create a state-of-the-art standardisation framework for banking corporate governance requirements, which will also clarify the supervision thereof. The requirements should provide a basis for appropriate management and control of business activities. For banks, the focus is on risk management, internal controls and general corporate culture. The board of directors and executive board have a major role to play here. Among the matters to be fleshed out are the expertise present in the board of directors, the role of the chair of the board of directors and responsibility for corporate culture.

Measure 2: Introduce a lean senior managers regime for SIBs in particular. A senior managers regime will assign specific responsibilities to senior management and make it easier for FINMA to attribute misconduct to individuals and hold them accountable.

Measure 3: Strengthen the legal basis for remuneration-related requirements and interventions at SIBs, and potentially all banks. To prevent moral hazard, the requirements must ensure that the remuneration systems are closely aligned with an institution's long-term economic success and do not allow any risk-taking detrimental to this success to become attractive. FINMA must be able to enforce the requirements. Effective measures include, for example, a regulation on retention periods for variable remuneration components, the linking of variable remuneration to long-term economic success criteria and the introduction of effective clawbacks allowing remuneration components that have already been paid out to be reclaimed.[26] Capping or prohibiting variable remuneration, on the other hand, is not considered appropriate; the empirical evidence[27] shows that this has disadvantages (in particular higher fixed salaries as a side effect).

With measures 1 to 3, and in particular the senior managers regime, the focus is on SIBs due to the far-reaching consequences of the failure of such firms. For all three measures, however, the extent to which proportional implementation would be appropriate for other categories of banks, or for all banks, should be examined during implementation.

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[26] Ruigrok and Lin expert opinion, p. 36

[27] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 35; Ruigrok and Lin expert opinion, p. 4

Measure 4: Examine the introduction of pecuniary administrative sanctions (fines) by FINMA against legal entities. FINMA could use this internationally widespread tool to sanction violations of supervisory law at institution level. However, if this sanctioning power were to be introduced, there is a risk that supervised parties' duties to cooperate with FINMA would be impaired, which would weaken FINMA's supervisory activity. In-depth clarifications are therefore required before this measure can be implemented.

Conversely, fines levied by FINMA against natural persons are not recommended for implementation at this time. Priority should be given to the examination of administrative fines against legal entities. If FINMA were to be authorised to impose fines on individuals, there is a risk that such fines would impair the supervisor's investigations in enforcement proceedings and thus significantly weaken the effectiveness of supervision. This measure would therefore have a counterproductive effect. Furthermore, potential FINMA fines against individuals could be ineffective, as they could lead to even higher remuneration or be financed by insurance solutions and thus lose their incentivising effect. In addition, FINMA already has at its disposal sanctions with far-reaching impacts on individuals, such as industry and activity bans, the withdrawal of recognition for guarantees of proper business conduct and the confiscation of unlawfully acquired profits (disgorgement).

Measures 5 to 8: In order to strengthen supervision, 1) introduce the principle of public notification of enforcement proceedings as standard, 2) adapt the industry ban and disgorgement of profits instruments, 3) for banks, enshrine in law the institutional guarantee of proper business conduct and the obligation to obtain authorisation for changes in management bodies, and 4) make it easier for FINMA to procure information from supervised parties. FINMA should only deviate from the principle of notifying the public about completed enforcement proceedings in exceptional cases, e.g. for personal privacy reasons or due to other ongoing proceedings. In addition, FINMA should be legally empowered to provide information about investigations and the opening of proceedings. In particular, this measure will have a preventative effect. Financial institutions and senior executives will have to assume that violations of supervisory law will be made public. This will incentivise compliance with supervisory law and promote individual accountability and responsibility.

Aligning the prohibition from practising a profession (industry ban) under Article 33 FINMASA with the prohibition from performing an activity (activity ban) under Article 33a FINMASA will enable FINMA to also impose an industry ban in the event of a serious breach of the institution's internal regulations. The options for disgorgement of profits should also be extended to other natural persons as well as those in management positions (Art. 35 FINMASA, "Confiscation").

Enshrining in law the institutional guarantee of proper business conduct and the obligation to obtain prior authorisation for changes in governing bodies replicates for banks what has already been introduced in other sectors and will support FINMA's supervisory activity.

Finally, the group of those subject to the duty to provide information and to report under Article 29 FINMASA should be extended to enhance FINMA's ability to obtain information for investigating possible violations of supervisory law. Although the assessment reveals a need for action as regards the lack of protection for whistleblowers, the renewed rejection by the National Council of a regulation under the Noser motion (23.3844) shows that there is still no prospect of a compromise solution in Parliament. It is therefore not recommended that a corresponding measure be implemented only in financial market legislation.

Measure 9: Examine the possibility of reducing the duration of procedures for implementing supervisory decisions. As the rapid enforcement of certain FINMA rulings can be key to safeguarding financial stability, particularly in the case of SIBs, efforts should be made to adapt administrative procedural law as far as possible in order to shorten such procedures. As adjustments to shorten procedure duration would have a major impact on administrative procedural law, further clarifications are required in this area.

Measures 10 and 11: Examine stricter requirements around the use of audit firms in order to strengthen the dual supervisory system. The dual system in the area of financial market supervision involves the use of audit firms. Stronger control mechanisms should be sought in this regard, e.g. through more stringent requirements on the independence of audit firms. Direct mandating of audit firms by FINMA could increase the independence of such firms. However, the disadvantages (e.g. a possible need for tendering under public procurement rules, operationalisation of the selection process at FINMA) need to be explored further before this measure

is implemented. In addition, there should be a review of the entire system of dual supervision for SIBs. Abolishing the dual system for SIBs could strengthen FINMA's effectiveness and efficiency and thus bolster direct supervision by FINMA, which is particularly relevant in the case of SIBs.

Measures 12 and 13: FINMA must be adequately resourced and the FINMA Board of Directors' responsibility for matters of substantial importance must be examined. FINMA is responsible for determining and procuring the resources required to fulfil its remit. The Federal Council considers it essential that FINMA should have the appropriate and necessary number and quality of staff, taking into account the recommended expansion of the toolkit and within the current funding structures. In addition, any findings of the PInC may provide insights into the extent of necessary resourcing measures.

The FINMASA states that the FINMA Board of Directors is responsible for "matters of substantial importance". With a view to the effectiveness of supervision, the advantages and disadvantages of the current division of responsibilities between the Board of Directors and the Executive Board should be examined. Here too, any PInC findings must be taken into account.

4.2.2 Capital requirements

4.2.2.1 Background and objectives

The TBTF capital requirements have essentially proved their worth, but they do have some weaknesses, as highlighted for example by the Credit Suisse crisis. These include the lack of forward-looking components in the requirements, the comparatively low capitalisation of parent banks in international financial groups and the insufficient contribution of AT1 instruments to SIB recovery before the PONV is reached. The quality and transparency of the capital requirements and their consistent implementation are also key. Furthermore, the mitigating incentivising effect of the capital requirements on a bank's growth has become more important now that only one G-SIB remains.

In the Federal Council's view, the above-mentioned critical points should be addressed as effectively as possible by tightening the capital requirements, embedded where possible in the international context. The detailed assessment of capital requirements can be found in chapter 7.

4.2.2.1 Proposed measures

Measures 14 to 17: Strengthen the capital requirements for SIBs in a targeted manner. Firstly, for SIBs, the institution-specific capital surcharge ("Pillar 2 surcharge") should be supplemented with forward-looking elements and regularly determined by FINMA based on stress tests and ongoing supervision. When setting the Pillar 2 surcharges, elements such as profitability and the risk profile of the business model, market-based indicators (e.g. market capitalisation, ratings and CDS premia) and, if necessary, corporate governance factors (e.g. complexity and corporate governance) should be taken into account. The most suitable way to disclose the results of these stress tests will need to be examined.

Secondly, in the case of SIBs, the capital requirements for the parent bank should be strengthened in a targeted way, by requiring more capital backing for foreign participations. This measure is intended to create more room for manoeuvre in a crisis. In the event of insufficient backing, a loss-absorbing disposal of foreign participations will have a negative impact on the capitalisation, which may hamper the implementation of corresponding recovery measures. The same is true by analogy for any ring-fencing measures by foreign authorities, such as higher regulatory requirements or restrictions on asset outflows for subsidiaries or branches of a Swiss bank abroad. Sufficient capital backing for foreign participations addresses this issue in a targeted way. It will also ensure strong capital adequacy if a SIB experiences high growth abroad. While the measure is to be introduced for all SIBs, it will de facto only affect internationally active SIBs with complex structures and substantial foreign participations. It will result in a higher unweighted capital ratio (leverage ratio) for the parent bank and for the financial group as a whole. More transparency should also be created internationally regarding the capitalisation of parent banks.

However, there should be no increase in the progressive component of the capital requirements for SIBs. For one thing, the existing progressive component is already having a strong impact today. Also, the measures outlined above will already bring about a significant and targeted increase in capital, particularly for internationally oriented SIBs, while a tightening of the progressive component would have an undifferentiated impact on all entities of the financial group in Switzerland.

A general increase in the leverage ratio requirement, as has been proposed on various occasions, is also not recommended. This would not take adequate account of SIBs' risk exposure. In addition, the measures outlined above will already lead to higher capital requirements, in a very risk-oriented and targeted manner. Moreover, a massive increase in the leverage ratio requirement could hardly be limited to SIBs, but would have to apply to all banks in order to create a level playing field.

Measures 18 to 20: Strengthen the quality of SIBs' capital base in a targeted manner. In particular, the regulatory treatment of assets that are not sufficiently recoverable in crises (e.g. capitalised IT costs, deferred tax assets) and of fair value items that are difficult to value (those without current market prices or observable valuation parameters) should be reviewed and tightened. The applicable capital requirements for SIBs must also be consistently enforced (e.g. in the case of "regulatory filters").

In addition, the risk-bearing function of AT1 instruments on a going-concern basis should be strengthened, i.e. before a crisis-hit bank reaches the PONV. There needs to be even greater clarity in the regulation of, for example, the suspension of coupon payments and repurchases. Furthermore, a raising of the triggers at which AT1 instruments can be recognised must be examined. This would bolster the intended purpose of AT1 capital as going-concern capital in accordance with the international standard. These clarifications on AT1 instruments should also be introduced at the international level.

However, a general abolition of AT1 instruments and replacement with CET1 capital should not take place unless this is pursued internationally. Similarly, only allowing conversion instruments – and no longer write-off instruments – as AT1 capital at the regulatory level is not to be pursued. Unilaterally abolishing or adapting the AT1 instruments would result in Swiss capital requirements deviating fundamentally from the international regulatory framework, with corresponding disadvantages.

Measure 21: Continue to exempt TBTF capital instruments from withholding tax. The current exemption from withholding tax for TBTF capital instruments ensures that banks can issue them from Switzerland on competitive terms. This should be continued (see section 7.5.8.2).

4.2.3 Early intervention and recovery

4.2.3.1 Background and objectives

The more advanced a bank crisis is, the more difficult it becomes to successfully stabilise the bank. Clear criteria and associated measures to be taken by the bank or options for intervention by FINMA are therefore crucial. In the particular case of Credit Suisse, it became apparent that the recovery plan prepared by the bank was not sufficiently effective in the specific circumstances and that FINMA's supervisory interventions were also unable to stabilise the situation.

Therefore, to reduce the likelihood of a SIB reaching the critical PONV, both the banks' ability to stabilise themselves and the scope and applicability of early interventions by FINMA should be expanded and strengthened. The detailed assessment of these topics can be found in chapter 12.

4.2.3.2 Proposed measures

Measure 22: Expand FINMA's options and obligations in relation to early intervention in banks and regulate them more clearly in law. The BankA currently provides for measures, such as issuing directives to bank management bodies or replacing management bodies, which FINMA can already take as protective measures if there are reasonable grounds for concern that a bank is over-indebted or has liquidity problems, or if the bank no longer meets the capital requirements. In the future, FINMA should be able to take such measures as part of the recovery process or even earlier, based on clear criteria. In addition, there are measures included in the general FINMA toolkit and the triggering of further recovery plan measures. Insurance regulation, for example Article 51 of the Insurance Oversight Act of 17 December 2004[28] (IOA), also contains protective measures that FINMA can take if regulatory requirements are violated or the interests of policyholders are not safeguarded.

The triggers and timing for early interventions should now be defined as clearly as possible. The use of market indicators and stress tests to trigger early interventions should also be examined and, if appropriate, the definition of the PONV and the delimitation of the recovery phase should be clarified.

[28] SR 961.01

Measure 23: Strengthen the ability of SIBs to stabilise themselves in a crisis and enshrine the requirements in law. Specific requirements (e.g. regarding activation of the recovery plan, the scope of recovery measures and their feasibility) should be laid down in the Banking Ordinance of 30 April 2014[29] (BankO), as regards both the preparation of the recovery plan by the bank and its approval by FINMA.

The bank will have to demonstrate that it meets the requirements in relation to the recovery plan (as with the provisions on the emergency plan). In addition, FINMA should be able to take measures to remedy any deficiencies (e.g. by means of capital or liquidity surcharges) in the same way as for the emergency plan.

4.2.4 Ensuring liquidity during a crisis

4.2.4.1 Background and objectives

The unprecedented outflows at Credit Suisse and at some US banks have made clear the importance of ensuring comprehensive liquidity in a crisis. Instant, widely disseminated information can lead to rapid and very high liquidity outflows, especially at a bank that is already in crisis.

The Credit Suisse case highlighted the factors influencing the extent of liquidity provision by the central bank as lender of last resort (insufficient amount of prepared collateral, issue of market stigma, collateral not in the right place within the group). Last but not least, a PLB instrument for SIBs was lacking in ordinary law, although a bill to this effect was already being prepared.

Sufficient liquidity in a crisis not only aids the survival of a SIB but is also a central component of a restructuring or bankruptcy liquidation.

A comprehensive, legally regulated package on sufficient liquidity, with a view to prevention and to ensuring liquidity in a crisis, is therefore a key tool of the TBTF regime. This includes strengthening the liquidity levels of SIBs, significantly expanding the potential for liquidity provision via the LoLR and, as a subsidiary measure and absolute last resort ("ultima ratio"), the possibility of granting state guarantees by means of a PLB. In an age of digital and unfiltered instantaneous information and real-time digital banking services, the PLB is a key confidence-building instrument.

The detailed assessment on ensuring liquidity can be found in chapters 8 to 10.

4.2.4.2 Proposed measures

Measures 24 to 27: With regard to liquidity requirements, 1) critically review the standards for liquidity requirements at international level, 2) tighten the requirements on the provision of information by banks at national level, and 3) examine the introduction of a Covered Bond Act. It should be refrained from implementing any regulatory restrictions on deposit withdrawals. The latest revision of the Liquidity Ordinance of 30 November 2012[30] (LiqO) significantly increased the liquidity requirements for SIBs in Switzerland ("first line of defence"). Steps to bolster banks' own liquidity holdings are already being implemented with the special liquidity requirements which must be fully met by SIBs by the end of 2024, and will be reviewed again by the end of 2026 in accordance with the stipulations in the LiqO[31]. In addition, the Swiss authorities should work to ensure that the international standards on liquidity requirements that apply to all banks are reviewed and strengthened in light of the findings. For example, the outflow factors of the liquidity coverage ratio (LCR) and certain weighting factors of the net stable funding ratio (NSFR) should be critically examined. A standardised calculation of these ratios is important in order to ensure fair competitive conditions for all banks. Moreover, a unilaterally stricter design of LCR calculations for Swiss banks compared to the international standard would be problematic, especially in a crisis, as Swiss banks would have a lower LCR for the same liquidity holdings (and would be assessed more critically by the market).

At national level, the requirements on the provision of liquidity information by banks for the supervisory authority must be further tightened. Timely and qualitatively reliable data is key to enabling the early identification and management of a liquidity crisis by the authorities.

[29] SR 952.02

[30] SR 952.06

[31] AS 2022 359

It should be examined whether introducing a Covered Bond Act would be an appropriate and effective way to facilitate the diversification of funding sources, particularly in light of the existing Mortgage Bond Act of 25 June 1930[32]. It is important to ensure that such legislation does not result in any new or additional risks for the state or taxpayers. In particular, the interdependencies between covered bond instruments and the LoLR measures as well as the planned, state-backed PLB would need to be taken into account.

However, the introduction of regulatory restrictions on deposit withdrawals to reduce outflows in a crisis should not be pursued, as this would represent too great an interference in bank customers' withdrawal options and in the banks' business model. Depositors should not be tied to a bank by regulation. Moreover, such a measure could exacerbate a loss of confidence. Moreover, introducing withdrawal restrictions could mean that, in a crisis, bank customers would become even more suspicious of the bank concerned, owing to the limited amount that can be withdrawn, and might bring forward their deposit withdrawals, thereby potentially exacerbating the crisis.

Measure 28: With a view to significantly expanding the potential for liquidity provision via the LoLR, review and, if necessary, adapt the legal framework. Liquidity needs in a crisis should be covered as comprehensively and efficiently as possible using ordinary and emergency liquidity facilities. As part of Parliament's mandate to the Federal Council in accordance with postulate 23.3445 "Review of the SNB's toolkit", an in-depth examination should be carried out of how and to what extent the potential for liquidity provision via the LoLR can be expanded in a targeted manner, taking into account the SNB's constitutional mandate and the new interactions between the facilities and the planned introduction of the PLB. In this context, the existing legal framework for the LoLR should be reviewed and, if necessary, adapted, and the introduction of new facilities and/or the adaptation of existing facilities taken into account. Another important finding from the assessment is that, taking cost-benefit aspects into consideration, a regulatory obligation should be introduced for banks to prepare for recourse to liquidity from the LoLR.

Increasing the potential for liquidity provision also includes expanding access to the facilities of foreign central banks. Lastly, the transferability of liquidity assistance within a banking group should be strengthened.

To reduce the problem of stigma, adjustments to the disclosure obligations of banks and the SNB should also be examined, taking into account the corresponding regulations abroad.

Measure 29: Enshrine the PLB for SIBs explicitly in law. As envisaged in the Federal Council's dispatch to Parliament, the PLB should be available to use only in the context of a restructuring, and compensated by the SIBs in the form of regular ex ante lump sum payments.[33]

The Federal Council does not consider extending the PLB to non-systemically important banks to be an effective approach. Compared with SIBs, non-systemically important banks pose lower risks to financial stability due to their smaller size and interconnectedness with the financial system as well as the greater substitutability of the services they provide. Accordingly, they are not subject to the additional regulatory requirements for SIBs. However, the potential for liquidity provision via the LoLR in Switzerland should be expanded to cover all banks, thereby further reducing the relevance of a PLB for smaller banks.

Measure 30: Refrain from expanding depositor protection. The assessment shows that measures such as expanding deposit insurance could, in principle, strengthen depositor protection. The options indicated were already known at the time of the amendments to the BankA relating to deposit insurance and insolvency[34] that came into force on 1 January 2023, but were deliberately not included by the legislator.

Furthermore, adjustments to depositor protection are not a targeted measure for mitigating the TBTF issue. The primary objective of the TBTF regime remains to ensure the continuation of systemically important functions and thus depositors' access to their assets. Deposit insurance does not come into play with this objective. Thus, as far as deposit insurance is concerned, it would only be possible to achieve a small mitigation of the TBTF issue, and the

[32] SR 211.423.4
[33] BBl 2023 2165
[34] AS 2022 732

costs would be high. For this reason, adjustments to depositor protection should be dispensed with in favour of other measures.

4.2.5 Resolution planning

4.2.5.1 Background and objectives

As the Credit Suisse crisis has made clear, the prospects of a resolution strategy succeeding (i.e. the strategy aimed at restructuring or bankruptcy liquidation with the continuation of systemically important functions in accordance with the emergency planning) can be assessed differently depending on the crisis scenario. The more flexible and varied the strategies prepared, the more comprehensive the toolkit, and the more unambiguously the remaining obstacles are eliminated, the greater the chances of a resolution being successfully implemented.

It is therefore important to minimise remaining uncertainties, risks and obstacles to resolution and to expand the number of variants and tools prepared for use in a crisis, in order to ensure that resolution is a credible instrument that can be implemented in a wide variety of crisis scenarios with an acceptable level of risk. In particular, there must be no doubts about the resolvability of Switzerland's only remaining G-SIB. The detailed assessment of resolution planning can be found in chapter 13.

4.2.5.2 Proposed measures

Measures 31 to 34: In particular for G-SIBs, 1) develop and legally safeguard a range of resolution strategies, 2) introduce a resolution plan requirement for the parent bank and 3) increase the legal certainty of a bail-in. In addition to preparatory work by FINMA, legal adjustments are required to expand the options for restructuring, in particular to increase legal certainty for an "orderly wind-down" option (i.e. a restructuring with the intention, not of keeping a SIB alive, but of winding it down over a period of a few years). Resolution strategies must be updated regularly, taking into account the changing business model and environment, and tested regularly in advance wherever possible. The interaction between authorities is to be reviewed and included in the tests. At national level, liquidity provision – including a possible PLB – can be cited in this regard.

In addition, internationally active SIBs would have to show in a resolution plan how any parent bank could be resolved over a period of a few years. This should safeguard the TBTF objective of financial stability, with the emergency plan covering the objective of continuing systemically important functions. As part of this resolution plan, it should also be possible to further reduce intragroup interdependencies with a view to resolvability, with the aim of achieving the clean holding company that is important for resolution, i.e. a top-level entity without financial obligations that present an obstacle to resolution.

At international level, legal certainty in the event of a bail-in should be further increased. This also involves issues relating to foreign law, over which Switzerland has only a very limited influence.

The creation of a resolution fund is not recommended for implementation due to the highly concentrated structure of the Swiss banking landscape.

Measure 35: The introduction of a legal basis for temporary public ownership (TPO) for the continuation of systemically important functions should not be pursued. The possibility of TPO is provided for in the FSB standard and its application was one of the options examined in the Credit Suisse case. TPO would have to be designed as an "ultima ratio" instrument in a crisis, its potential purpose being limited to the continuation of systemically important functions in Switzerland. However, this option would create substantial false incentives for both SIBs and the authorities and entail excessive risks for the state. Moreover, in the event that the implementation of the emergency plan requires additional liquidity, the introduction of a PLB as an "ultima ratio" instrument is already provided for.

Measure 36: Fundamental restrictions on the group structure of banks (e.g. segregated banking system or size restrictions) should not be pursued. The financial and operational interdependencies within a financial group pose a challenge for bank recovery or resolution. These must be addressed as part of the recovery and resolution measures (e.g. resolution plan for the parent bank) and in the capital measures (e.g. adjustment of capital adequacy for foreign participations). Even segregated banks are not immune to crises, as illustrated by the bankruptcy of Lehman Brothers, which was purely an investment bank. The Federal Council also believes that fundamental structural measures represent a disproportionate encroachment on economic freedom.

4.2.6 Crisis organisation and cooperation between authorities

4.2.6.1 Background and objectives

Action and reaction in a crisis, including intervention by the authorities, takes place amid much uncertainty. Good crisis organisation, clearly assigned duties, the allocation and assumption of responsibility and effective cooperation between authorities are key.

The goal is to take the necessary measures at the right time. This requires optimal structures and rules that are defined, established and maintained outside the context of a crisis (e.g. efficient information sharing and trust-building cooperation). More information about these topics can be found in chapter 17.

4.2.6.2 Proposed measure

Measure 37: Examine how the authorities' cooperation and decision-making processes can be more clearly regulated and strengthened. Various expert opinions propose changes to the existing institutional framework for the supervision, resolution and crisis management of SIBs. The proposals include bringing macro- and microprudential supervision of SIBs closer together, with supervision of SIBs being performed by the SNB, and strengthening crisis cooperation between authorities, for example through the creation of a stability board. The work of the PInC must be incorporated in the assessment and design of this measure.

4.3 Next steps and outlook for implementation of the measures

The package of measures proposed in this report entails amendments at the legislative (i.e. act) and ordinance level. The Federal Council believes that the package of measures should be implemented quickly, with relevant findings of the PInC being incorporated in the specific solution devised.

To ensure rapid implementation, the Federal Council envisages a staggered approach based on two packages. The first package will contain amendments at ordinance level that can be adopted by the Federal Council. In a second package, a dispatch with amendments at the legislative level will be drawn up. The Federal Council has already submitted a dispatch to Parliament[35] on the introduction of a PLB, which is part of the package of measures.

In the Federal Council's view, the proposed measures should be viewed as an overall package that further develops and supplements the existing TBTF regime in a targeted way.

Implementation of the overall package significantly reduces the likelihood of another crisis at a SIB in Switzerland. This will require banks to take individual responsibility. Should a crisis nonetheless occur, the recoverability and resolvability of a SIB will be greatly increased.

By implementing these measures, Switzerland will strengthen not only its own financial and banking centre and thus its status as a business location, but also the stability of the global financial system. Accordingly, Switzerland will also work to promote these measures in the relevant international bodies.

[35] BBl 2023 2165

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CREDIT SUISSE

PART II: BACKGROUND AND ASSESSMENT

The following chapters of the report contain the background information and assessments on which the measures proposed in *Part I* (esp. chapter 4) are based. In addition to an account of the Credit Suisse crisis, the assessment includes a comprehensive appraisal of the TBTF regime and corporate governance and supervision matters that have proven to be central to the stability of the financial centre and have been addressed by Parliament in numerous motions.

While *Part I* is organised according to the identified need for action, the order of the topics in *Part II* is based on the analytical perspective of an overview – first on the TBTF regime and then on other topics, namely: the definition of systemic importance (chapter 6), capital requirements (chapter 7), liquidity requirements (chapter 8), liquidity assistance (chapters 9 and 10), deposit protection (chapter 11), recovery (chapter 12), resolution (chapter 13), structural measures (chapter 14), corporate governance (chapter 15), other supervisory matters (chapter 16) and institutional responsibilities relating to financial stability (chapter 17).

The individual chapters are organised in a standardised manner where appropriate. They explain the existing regulations first of all and include an international comparison. Any deficits are identified in the assessment, along with the corresponding need for action. Possible measures are then explained and evaluated. In the conclusion, the proposed measures are explained within the overarching context of the respective topic.

5 Credit Suisse: The crisis and the measures taken

5.1 How the crisis developed

The Credit Suisse crisis of March 2023 was the result of repeated incidents and irregularities at the bank which continued for several years and eventually came to a head in March 2023 with an acute crisis of confidence.

In particular from 2018 onwards, Credit Suisse was repeatedly at the centre of scandals and leaks. There were clear signs of a sub-par corporate culture and inadequate risk management as well as a lack of assertiveness and sense of responsibility at management level. Striking examples of this include the case of Mozambique, the bank's surveillance activities, or the Greensill and Archegos cases (see section 5.2).[36]

Further examples involve the many unplanned changes in the bank's Board of Directors and Executive Board, particularly from 2021 onwards, such as the departure of the Chairman in early 2022. Credit Suisse announced another restructuring programme, including a risk reduction plan at the investment bank, in order to achieve increased stability in returns. These restructuring plans were never followed through in a convincing manner, however, and the bank's returns remained volatile overall.

All of this led to the bank's investors and customers steadily losing confidence. Credit Suisse's reputation and profitability had been stuck in a downward spiral for several years. This was also reflected in the share price trajectory (see Figure 3).

Apart from a one-notch upgrade in the Moody's rating in December 2020, the long-term credit rating of the Credit Suisse Group by the three major rating agencies of Fitch, Moody's and Standard & Poor's remained stable from 2018 until spring 2022. It was not until May and August 2022 that there were several rating downgrades, notably by Fitch and S&P in May 2022 and by Fitch and Moody's in August 2022. The agencies cited the bank's weak profitability as the reason for these downgrades, along with weaknesses in risk management and the risk culture at the bank. Amongst other things, these downgrades resulted in an increase in the cost of liquidity.

Then, in July 2022, the bank announced it was changing its CEO with immediate effect and starting a comprehensive strategic review of its investment bank, although the details of this would not be communicated until October. The bank then promised to accelerate the reduction of costs and risks at the investment bank by 2025. While the plans were generally welcomed by the market, the implementation risks were considered to be high. S&P referred to the execution risks when reducing the long-term rating of the Credit Suisse Group by one notch in early November 2022. In the same period, although Moody's and Fitch confirmed their previous ratings, they also emphasised the negative outlook, given the substantial execution risks involved in the strategy adjustment.

From autumn 2022, the bank's liquidity was coming under pressure. The bank's growing crisis of confidence led to an outflow of client deposits on a historic scale, especially in October 2022. Between October and the end of December 2022, client deposits amounting to CHF 138 billion were withdrawn.[37] This outflow of deposits was initially absorbed thanks to the bank's substantial liquidity buffer.[38]

The bank succeeded in increasing its capital by CHF 4 billion at the beginning of December 2022 to finance the planned restructuring. However, operating losses and the costs of the strategic review resulted in an end-of-year loss of CHF 7.3 billion. The restructuring plan provided for several more quarterly losses.

In early 2023, Credit Suisse was still unable to meet its profitability forecasts. There were also increasing indications of inadequate governance and operational organisation.[39] Nevertheless, the bank stabilised to a certain extent, for example it was able to issue long-term bonds totalling CHF 4 billion, and in January and February 2023 was able to slightly rebuild its liquidity buffer.

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[36] FINMA press releases:
- Mozambique loans: FINMA concludes proceedings against Credit Suisse, 19 October 2021
- Credit Suisse observation activities: FINMA identifies serious breaches of supervisory law, 19 October 2021
- FINMA concludes "Greensill" proceedings against Credit Suisse, 28 February 2023
- Archegos: FINMA concludes proceedings against Credit Suisse, 24 July 2023

[37] Credit Suisse Group AG, Annual Report 2022, pp. 67 and 276

[38] See FINMA, FINMA Report: Lessons Learned from the CS Crisis, 19 December 2023, p. 66 f.

[39] See, for example, FINMA press release, FINMA concludes "Greensill" proceedings against Credit Suisse, 28 February 2023

From March 2023, several negative developments followed one another in rapid succession. In the USA, several banks suffered substantial losses amid rising interest rates. The failure of the American banks *Silicon Valley Bank* and *First Republic Bank,* and the distress experienced at *Signature Bank,* led to great uncertainty on the global financial markets. These difficult market conditions were compounded by negative headlines about Credit Suisse. On 9 March 2023, the bank postponed the publication of its annual report for 2022 due to open points with the US Securities and Exchange Commission (SEC). It was finally published on 14 March 2023. Amongst other things in this report, the bank had to acknowledge reservations about material weaknesses in internal control over financial reporting.[40] On 15 March 2023, a statement by the Chairman of Credit Suisse's principal shareholder, the Saudi National Bank, that they would categorically rule out further investment in the bank, was doing the rounds in the media.

With Credit Suisse already plagued by a significant loss of confidence, doubts in its ability to survive skyrocketed. Both the bank's stock market value and the market value of particularly risky debt instruments, such as AT1 instruments, fell sharply and the bank was hit again with serious outflows of liquidity. The bank was now facing an acute crisis of confidence and was under threat of insolvency immediately after the weekend of 18–19 March 2023.

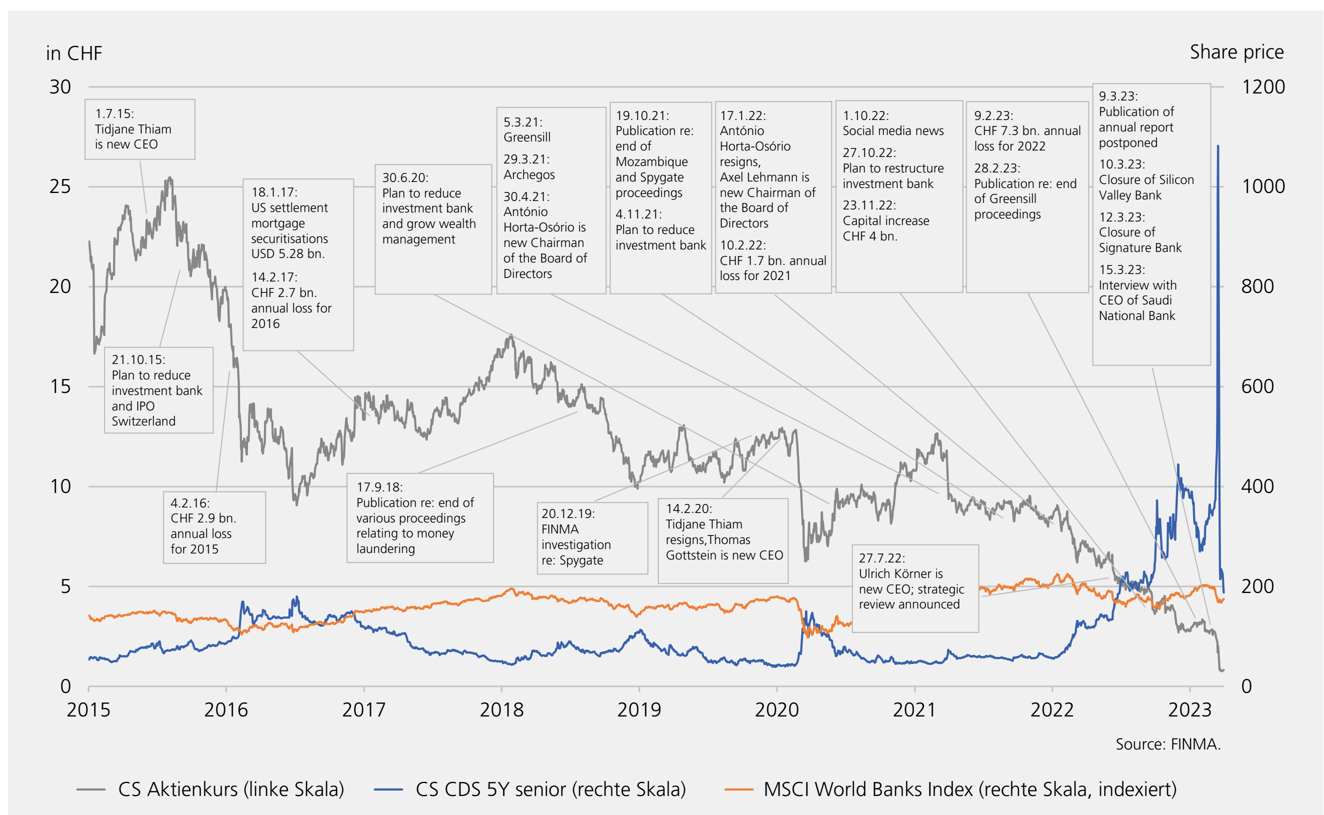

Figure 3: Share price trend and CDS of Credit Suisse Group

[40] Credit Suisse Group AG, Annual Report 2022, p. 50 ff.

5.2 Measures carried out by the authorities prior to 15 March 2023

FINMA intensified its supervisory and enforcement activities from 2012 because of the accumulation of problems at Credit Suisse. FINMA carried out a total of 43 preliminary investigations for possible enforcement proceedings, issued 9 reprimands, reported 16 criminal offences and completed 14 enforcement proceedings (11 of which were against the institution and 3 against natural persons). Of these 14 enforcement proceedings, 11 occurred in the period after 2018.[6]

As FINMA explained in depth in its report of 19 December 2023, these interventions related to various problem areas at Credit Suisse. For example, in relation to management and risk culture, FINMA repeatedly criticised a lack of transparency towards the supervisory authority, insufficient awareness of problems and risks and an inappropriate corporate culture in parts of the organisation. With regard to the remuneration system, it called for various shortcomings to be rectified (such as false incentives) and achieved a reduction in variable remuneration. It ordered measures for risk management and the internal control environment, which in some cases impacted the operating business, such as temporary business restrictions or a reduction in distributions to shareholders. FINMA also imposed further requirements on Credit Suisse relating to capital and liquidity.

In view of the worsening crisis of confidence, FINMA also called for further stabilising measures from October 2022 based on the data that was submitted daily (although not necessarily updated daily) by Credit Suisse. These included measures to be taken by Credit Suisse regarding liquidity, as well as more extensive measures relating to the capital base and the identification and preparation of further strategic options in the event that the measures taken were not sufficient.

At this point in time, the SNB was also in constant contact with Credit Suisse to examine options for providing liquidity assistance if required.

In addition to the actions carried out by FINMA and the SNB, contact between Credit Suisse and the FDF, the SNB and FINMA also intensified from August 2022. The envisaged crisis organisation [41][42] consists of two committees, the *Steering Committee* (SC) and the *Committee on Financial Crises* (CFC). The SC is responsible for strategic coordination of the crisis organisation and the decisions on any interventions. It is composed of the Head of the FDF (Chair of the committee), the Chair of the SNB's Governing Board and the Chair of FINMA. The CFC is responsible for coordinating preparatory actions and for crisis management. It is composed of the CEO of FINMA (generally the Chair of the committee), the State Secretary of the FDF, the Vice Chair of the SNB's Governing Board and the Director of the Federal Finance Administration.

From autumn 2022, the Credit Suisse situation was assessed by the CFC at regular meetings, in particular with regard to the liquidity ratios. Possible measures were also evaluated and potential courses of action were prepared in case the overall situation were to worsen (see section 5.4). Between August 2022 and March 2023, there were 24 formal CFC meetings, along with multiple meetings at a technical level. The CFC reported to its decision-making body, the SC, which met 14 times during this period.

In view of the high liquidity outflows, from the beginning of October 2022 the CFC began to discuss the appropriateness of a PLB that could be implemented at short notice, and initiated the relevant preparations. A PLB was identified as a likely central instrument regardless of the specific implementation of a TBTF instrument (restructuring, liquidation) or other scenarios (sale). On 11 January 2023, the SC decided that the SNB was to carry out consultations on issuing additional liquidity assistance loans (ELA+) [43] and that the FDF would clarify matters on the use of a PLB outside a financial restructuring plan.

[41] FINMA, FINMA Report: Lessons Learned from the CS Crisis, 19 December 2023, p. 6

[42] FDF, FINMA and SNB, Memorandum of Understanding on trilateral cooperation in the area of financial stability and financial market regulation between the FDF, FINMA and the SNB, 2 December 2019

[43] The plus sign indicates the SNB's additional liquidity assistance loans over and above the ordinary ELA

Likewise, the possibility of a (partial) Temporary Public Ownership (TPO) of Credit Suisse Schweiz – but not the entire Credit Suisse Group – was discussed from October 2022 onwards by the CFC, but was not prioritised. On 11 January 2023, the SC issued the FDF with a mandate to carry out an evaluation. Both PLB and TPO were considered as a means of helping with the bank's recovery as well as a means of overcoming an acute crisis, as was to occur in March 2023.

On 15 March 2023, FINMA and the SNB issued a joint statement,[44] in which FINMA confirmed that Credit Suisse continued to meet the capital adequacy and liquidity requirements. The SNB also announced that it would provide liquidity to Credit Suisse via ELA if required. Credit Suisse opted to announce to the market, virtually at the same time. that it would immediately avail itself of the liquidity assistance from the SNB.

The possibility of a takeover of Credit Suisse by UBS was being prepared with the latter from 15 March 2023. Prior to this, the option of a solution involving a private sector takeover was being intensively discussed between the authorities and with Credit Suisse from late autumn 2022, and preparations were being made.

5.3 Measures carried out by the authorities after 15 March 2023

Following a request by Credit Suisse on the evening of 15 March 2023, the SNB provided Credit Suisse with liquidity via ELA and the liquidity-shortage financing facility (LSFF),[45] amounting to CHF 48 billion on 16 March 2023.

Given that Credit Suisse's liquidity situation posed a threat to its existence, the Federal Council used emergency legislation ("emergency ordinance")[46] on 16 March 2023 to create the basis for the SNB to be able to grant Credit Suisse and UBS[47] ELA+. The Federal Council also introduced the legal basis for the PLB under emergency law.

On 17 March 2023, after exhausting the ELA capacity, the SNB issued Credit Suisse with additional liquidity assistance of CHF 20 billion on the basis of ELA+, without which Credit Suisse would have become insolvent on 17 March 2023. Use of the PLB was only possible from 19 March 2023 following approval by the Finance Delegation of the Federal Assembly (FinDel).

Between them, ELA and ELA+ created the liquidity required until the weekend of 18 and 19 March 2023, when the authorities were able to finalise a sustainable solution for Credit Suisse. At this point, based on all the assessable facts, it was clear that Credit Suisse was no longer able to restore confidence on its own and without government measures was under threat of insolvency immediately after the weekend of 18–19 March 2023. In light of this, the authorities reviewed all available options in depth over the weekend (see section 5.4). Responsibility for the strategic coordination of the measures on the weekend of 18 and 19 March 2023 lay with the SC.

The authorities came to the conclusion that under the circumstances, the scenario involving the takeover of Credit Suisse by UBS was, amongst other things, best able to achieve the goal of stabilising the market as quickly as possible at the lowest possible cost to the state and taxpayers (see section 5.4.4). Based on this decision, the Federal Council approved further emergency measures on 19 March 2023 (see below). Together with the resolutions of 16 March 2023, these secured the solvency of Credit Suisse and enabled its takeover by UBS. The measures were taken in order to protect financial stability, the Swiss economy and taxpayers.

The FDF subsequently issued rulings on remuneration, and the Confederation – represented by the Head of the FDF – signed a guarantee agreement with UBS.

Table 2 contains a summary of the main measures and actions taken by the federal authorities. The measures are described in more detail below Table 2.

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[44] SNB and FINMA press release, FINMA and the SNB issue statement on market uncertainty, 15 March 2023

[45] For a detailed explanation of terms, see section 9.1.2

[46] SR **952.3**

[47] Even if the takeover of Credit Suisse by UBS had not taken place, UBS would also have access to this liquidity, in view of the expected market reactions. It was never utilised, however

Measure	Decisions by Federal Council 2023	Decisions by FinDel	Actions by FDF/FINMA/SNB
Emergency liquidity assistance (ELA) and liquidity-shortage financing facility (LSFF)	(existing instruments)		SNB: Provided CHF 38 billion in liquidity via ELA and CHF 10 billion under the LSFF (16 March 2023)
Additional liquidity assistance loans (ELA+)	Ordinance to introduce the instrument (16 March 2023) Setting the amount at CHF 100 billion for Credit Suisse and UBS combined (19 March 2023)		SNB: Provided CHF 20 billion (17 March 2023) and CHF 30 billion (20 March 2023) in liquidity via ELA+
Liquidity assistance loans from the SNB with a federal default guarantee (PLB)	Ordinance to introduce the instrument (19 March 2023) Applied to the FinDel for a guarantee credit for CHF 100 billion (16 March 2023)	Agreed to guarantee credit of CHF 100 billion (19 March 2023)	FDF: Concluded a federal guarantee agreement in favour of the SNB for a maximum of CHF 100 billion (19 March 2023) SNB: Provided liquidity under the PLB in the requested amount of CHF 70 billion (20 March 2023) Agreement cancelled as of 11 August 2023
Loss protection guarantee	Ordinance to introduce the instrument (19 March 2023) Applied to the FinDel for a guarantee credit for CHF 9 billion (19 March 2023)	Agreed to guarantee credit of CHF 9 billion (19 March 2023)	FDF: Concluded a federal guarantee agreement with UBS for CHF 9 billion (9 June 2023) Agreement cancelled as of 11 August 2023
Derogations from the Mergers Act	Ordinance to introduce specific derogations (19 March 2023)		
Approval of merger	(Existing rule)		FINMA: approval of the merger instead of COMCO
Write-down of AT1 instruments	Confirmed the possibility under the ordinance (19 March 2023) to write down the AT1 instruments based on the existing law and contractual clauses		FINMA: Ordered Credit Suisse to write down the AT1 instruments in good time (the write-down itself was carried out by Credit Suisse)
FDF order regarding remuneration	Art. 10a BankA: Federal Council orders measures on remuneration (existing law) Clarified by ordinance that the FDF issues an order (16 March 2023)		FDF: Ordered Credit Suisse to provisionally suspend variable salary components (21 March 2023) FDF: Ordered Credit Suisse to remove or restrict variable salary components (23 May 2023) FDF: Ordered UBS to incentivise the realisation of Credit Suisse assets (23 May 2023)
Risk reduction with default guarantee	Requirement for the SNB and FINMA to reduce risk by ordinance (16 March 2023)		
Access in accordance with the Freedom of Information Act of 17 December 2004[48] (FoIA)	Exclusion by ordinance (16 March 2023) of access to information and data under the FoIA.		

Table 2: Summary of the main measures and actions taken by the federal authorities in connection with the crisis at Credit Suisse

[48] SR 152.3

The FDF subsequently issued rulings on remuneration, and the Confederation – represented by the Head of the FDF – signed a guarantee agreement with UBS.

Table 2 contains a summary of the main measures and actions taken by the federal authorities. The measures are described in more detail below.

The Federal Council created the following instruments to strengthen liquidity by means of an emergency ordinance:

– **Additional liquidity assistance loans with preferential rights in bankruptcy (ELA+, introduced on 16 March 2023):** It became possible for the SNB to award loans to a bank which is of systemic importance or part of a systemically important financial group, in addition to the existing option of ELA. These additional liquidity assistance loans, in the form of ELA+, were secured by preferential rights in bankruptcy in favour of the SNB. The maximum amount payable through additional liquidity assistance loans is set by the Federal Council, following consultation with the SNB. In this case, the ceiling was set at CHF 100 billion as a combined maximum for UBS and Credit Suisse. Credit Suisse drew down ELA+ of CHF 20 billion on 17 March 2023 and a further CHF 30 billion on 20 March 2023. On 11 August 2023, UBS announced that the loans drawn by Credit Suisse under ELA+ had been repaid in full. [49]

– **Liquidity assistance loans from SNB with a federal default guarantee (PLB, introduced on 16 and 19 March 2023):** With the PLB loans, Credit Suisse was provided with additional liquidity by the SNB via liquidity assistance loans with a federal default guarantee. These loans benefited from preferential rights in bankruptcy. On 16 March 2023, the Federal Council decided to apply for an urgent guarantee credit of CHF 100 billion from the FinDel to set up the default guarantee in favour of the SNB. The FinDel approved the application the same day. The SNB subsequently provided Credit Suisse with liquidity of CHF 70 billion on 20 March 2023 under the PLB. Credit Suisse repaid the PLB loans in full at the end of May 2023. The master lending agreement between the SNB and Credit Suisse was cancelled as of 11 August 2023. [50]

It is important to distinguish these newly created instruments from the SNB's long-established LSFF and the ELA. If needed, the SNB can use ELA to supply all SIBs with liquidity against collateral (mortgages and securities). On 16 March 2023, Credit Suisse received CHF 48 billion in liquidity assistance funding from the SNB via the LSFF and ELA. This liquidity assistance was not part of the Federal Council's emergency measures, but belonged to the SNB's existing set of instruments. However, it did form part of the overall package. Together, the three liquidity instruments (ELA, ELA+ and PLB) created sufficient funds to guarantee the solvency of Credit Suisse during the takeover by UBS and also to ensure the continuation of systemically important functions.

Further measures were taken in relation to the takeover of Credit Suisse by UBS:

– **Granting of a guarantee for loss protection (introduced on 19 March 2023):** As part of the takeover, UBS also acquired a portfolio of Credit Suisse assets which did not fit with UBS's core business and could not be integrated into the UBS business or risk profile. The assets UBS received in this portfolio are to be wound up over time. The risk they carried could not be adequately assessed in the space of four days in March 2023. As part of the takeover, the Confederation agreed to bear part of any losses arising from the realisation of these assets. The basis for this was Article 14*a* of the emergency ordinance. UBS would have to bear the first CHF 5 billion of any losses realised in the liquidation of these assets. The Confederation would assume losses above this amount, up to a maximum of CHF 9 billion. On 9 June 2023, the FDF and UBS signed the guarantee agreement which set out in detail the parameters in case the guarantee were called upon.[51] The agreement was terminated on 11 August 2023.[52]

[49] UBS press release, UBS Group AG voluntarily terminates Loss Protection Agreement and Public Liquidity Backstop guaranteed by Swiss government and Credit Suisse AG fully repaid ELA+ loan, 11 August 2023

[50] FDF press release, Credit Suisse/UBS: All federal guarantees terminated, 11 August 2023

[51] Federal Council press release, Confederation and UBS sign loss protection agreement, 9 June 2023

[52] FDF press release, Credit Suisse/UBS: All federal guarantees terminated, 11 August 2023

- **Derogations from the Mergers Act:** Article 10a of the emergency ordinance provided for individual exceptions to the Mergers Act of 3 October 2003 (MergA). [53] In particular, these exceptions meant that no general meeting resolutions of the financial groups involved were required for the takeover of Credit Suisse by UBS through a merger. Waiting for the general meetings of the two companies would have prevented the goal of immediate stabilisation from being achievable. Immediate stabilisation was both essential and in the country's best interest, in order to avert major economic damage, not only for Switzerland's financial centre, but also its industrial centre.

- **Approval of the merger:** Based on the existing legal provisions in Article 10 paragraph 3 in conjunction with Article 32 paragraph 2 of the Cartel Act of 6 October 1995 (CartA), [54] FINMA approved the provisional completion of the merger instead of Competition Commission.

- **Write-down of AT1 instruments:** The AT1 instruments issued by Credit Suisse included a provision in their contracts for them to be written down in full in the case of a trigger event, in particular if emergency government support is granted. Based on this contractual foundation, applicable law and the Federal Council emergency ordinance of 16 March 2023, FINMA instructed Credit Suisse to write down the AT1 instruments. Credit Suisse subsequently wrote down the assets in accordance with the contractual framework. This meant that private investors participated in the risks of the takeover with a nominal value of around CHF 16 billion, whereby the market value of these bonds was just under a third of the nominal value shortly before they were written down. This contribution was not solely a repercussion of the contractual provisions, it also played a materially essential role in stabilising Credit Suisse, ensuring national and international financial stability and preventing damage to the Swiss economy.

- **Measures on remuneration:** In the emergency ordinance of 16 March 2023, the Federal Council established that the FDF was responsible for measures on remuneration in accordance with Article 10*a* of the BankA. On 21 March 2023, the FDF issued an order to Credit Suisse temporarily suspending certain variable remuneration payments to its employees[55]. On 23 May 2023, the FDF issued a final ruling to Credit Suisse and instructed the bank that all outstanding variable remuneration for its three top management levels was to be cancelled, or reduced by 50% or 25%.[56] At the same time, it obliged UBS to design the remuneration system for employees who are responsible for realising the assets affected by the federal guarantee in such a way that it provides an incentive to minimise losses during realisation.

- **Risk reduction by the SNB and FINMA:** In accordance with Article 7 of the emergency ordinance, FINMA and the SNB had to ensure that the Confederation's risks arising from a default guarantee for liquidity assistance loans were reduced as far as possible.

- **Access to data and information according to the FoIA:** In Article 6 paragraph 3 of the emergency ordinance, the Federal Council excluded access to data and information under the Freedom of Information Act, to minimise the risk of compromising the flow of information between the parties involved. The Federal Council removed the FoIA exclusion in the ordinance revision of 15 September 2023 without replacing it.

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[53] SR 221.301

[54] SR 251

[55] FDF press release, Federal Council makes decisions on variable remuneration at Credit Suisse, 21 March 2023

[56] FDF press release, FDF orders measures on remuneration at CS and UBS, 23 May 2023

5.4 Actions not selected on 19 March 2023

From late summer 2022 and especially from October 2022 onwards, contact intensified between the authorities within the CFC and the SC (see section 5.2). Various courses of action were prepared, which are recorded below.

It should be noted that all of these options would have required the SNB and the Confederation to provide liquidity assistance based on emergency law, alongside the liquidity measures actually taken (see section 5.3).

5.4.1 Initiating a financial restructuring

The option of financial restructuring is a key element of the TBTF regulations (see section 13.1). This allows FINMA to initiate a restructuring if the criteria set out in Article 25 paragraph 1 BankA are met. According to Article 28 paragraph 1 BankA, this is subject to the condition that there is a reasonable prospect of the bank being successfully restructured or the individual banking services being continued.

Restructuring includes measures that involve repositioning the bank and subsequently have to be implemented by the bank. The restructuring measures typically involve adjusting the size and breadth of business activities with a view to achieving a credible and realistic repositioning of the bank over the long term.

Capital measures are required in order to be able to implement these restructuring measures within a short period of time. This includes writing the share capital and AT1 instruments down to zero. The bail-in bonds then need to be converted into shares either in full or in part, meaning that the corresponding creditors now own 100% of the bank. The governance measures provide for the replacement of the Chair of the Board of Directors by a person who will strengthen confidence in a sustainable restructuring. A trustworthy and effective management team is also vital, as are the appointment of a restructuring agent and the suspension of shareholders' rights for a certain period of time. [57]

In the situation specific to mid-March 2023, the authorities considered a restructuring plan for Credit Suisse to have considerable disadvantages in comparison to the alternative of a takeover by UBS. As such, the prospects of success of a restructuring were considered to be significantly less certain compared to the solution which was implemented. The massive loss of confidence with regard to Credit Suisse ahead of the weekend of 18 and 19 March 2023 was so extensive that it was considered highly questionable whether a further capital increase and the appointment of a restructuring agent and a new Chair would be sufficient to restore the necessary confidence.

In particular, it was unclear whether the repositioning of the bank which formed part of the restructuring plan would have been enough to convince the markets and the bank's customers on Monday morning, after trust in the bank had been damaged for months, if not years, and all the measures previously announced had not had sufficient effect. The repositioning would basically have involved implementing the strategy announced in the summer of 2022, yet its announcement and implementation in the preceding months had clearly failed to bring about the desired trend reversal. Furthermore, in this particular case, nothing would have changed at executive board level at the bank on Monday morning. The risk of an immediate adverse market reaction and the rapid need to initiate a liquidation were considered pertinent. On the other hand, the desired confidence-building effect was considered much more likely with a takeover by UBS, which had already successfully carried out such a repositioning.

Carrying out a restructuring at Credit Suisse, and in particular the associated bail-in, would also have entailed legal and implementation risks, particularly at international level.[58] In this case, too, extensive state measures based on emergency law (namely PLB or TPO) would have been necessary (see section 5.4.3).

On the whole, restructuring a G-SIB in March 2023 – a time of great uncertainty on the financial markets – carried major risks. If the restructuring had not proved successful, CS Group would have been declared insolvent, and the emergency plan would have been triggered at the same time.

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[57] FINMA describes the restructuring plan which was finalised on 19 March 2023 in its FINMA Report: Lessons Learned from the CS Crisis of 19 December 2023, p. 75 ff.

[58] See section 13.1.4 and FINMA, FINMA Report: Lessons Learned from the CS Crisis, 19 December 2023, p. 76f.

5.4.2 Liquidating the financial group due to insolvency and triggering the Swiss emergency plan

The TBTF regulations stipulate that insolvency liquidation proceedings can be opened in the event of impending insolvency of a SIB (Art. 25 para. 1 let, c BankA). This would mean each individual legal entity of the financial group being declared insolvent, with the exception of Credit Suisse Schweiz AG, which holds the systemically relevant functions. This Swiss entity would have been continued at least for a limited period after the emergency plan had been triggered, e.g. until a purchaser had been found (see Art. 9 para. 2 let. d BankA).

The insolvency of the Group, which would have accompanied the triggering of the emergency plan, would probably have had a huge destabilising effect on the markets. It would also have been highly uncertain as to whether the separated Swiss entity would have been able to regain the confidence of the markets and survive in this situation. As such, this option should be viewed as subsidiary to a restructuring of the group – it only comes into play if restructuring the group has no prospect of success or has already failed (ultima ratio). See section 13.1.7 for a detailed assessment of this option.

5.4.3 Temporary public ownership of Credit Suisse

The FDF had also investigated temporary public ownership (TPO) of the entire Credit Suisse Group[59] as an alternative. This is not provided for in the Swiss TBTF regime.

With TPO, the Federal Council would have resolved under emergency law that the Swiss Confederation would become the sole shareholder of Credit Suisse. This would have constituted a much more substantial state intervention than supporting the takeover of Credit Suisse by UBS. The Confederation would have assumed responsibility for the management and all the risks of the G-SIB with its worldwide operations.

This option was not prioritised during the preparatory work, due to the regulatory and risk considerations and in view of the potentially serious consequences for taxpayers. However, given the critical situation around the weekend of 18 and 19 March 2023, this solution was also examined as an option. See section 13.1.10 for a detailed assessment of this option.

5.4.4 Conclusion

On the weekend of 18 and 19 March 2023, the focus was on three options for solving the acute problems of Credit Suisse: a takeover by UBS, the restructuring and liquidation scenarios provided for in the TBTF regulations with activation of the emergency plan, and a possible TPO. Without any official intervention, Credit Suisse would have been under threat of insolvency when the markets opened on Monday 20 March 2023.

After carefully weighing up the advantages and disadvantages as well as the opportunities and risks, the Federal Council and the authorities involved came to the conclusion that, under the given circumstances, the officially supported takeover of Credit Suisse by UBS was the best way to achieve the objectives, in particular to stabilise the market as quickly as possible and thus also to contain the economic costs and the consequences for taxpayers.

[59] From autumn 2022, a state capital injection into Credit Suisse was also discussed in the SC, but rejected

6 Definition and meaning of systemic importance

Systemic importance and the criteria for designating systemically important banks (SIBs) are set out in Articles 7 and 8 BankA. SIBs are defined in Article 7 paragraph 1 BankA as those banks whose failure would cause significant damage to the Swiss economy and the Swiss financial system. According to Article 8 paragraph 2 BankA, the systemic importance of a bank is judged according to its size, its interconnectedness with the financial system and the economy, and the ability of the bank to substitute its services at short notice.

The current definition of systemic importance which is enshrined in Swiss law also corresponds to the international standard according to the BCBS.[60] Furthermore, there are no new findings which would call into question the definition used in Switzerland.[61] The definition of systemic importance therefore remains appropriate in the view of the Federal Council.

However, the US banking crisis from March to May 2023 demonstrated that even the failure of non-systemically important banks can trigger financial stability concerns in the event of a crisis. This raises the question of how the systemic importance of banks is to be defined against such a background.

The US authorities did not identify any non-systemically important banks as being systemically important during the 2023 banking crisis. Instead, they invoked a national opt-out clause for systemic risks in a bid to contain the risk of a potential wildfire that might have been triggered by contagion effects.[62]

If several non-systemically important banks collapse at the same time, or in close succession, the extent of the deepening crisis may jeopardise financial stability, even though none of the banks are designated as SIBs in their own right. A distinction can therefore be made between the systemic importance of a SIB which was defined in advance and the threat to financial stability by non-systemically important banks in a specific crisis.

The failure of a bank only becomes economically unacceptable if the institution exceeds a certain size and interconnectedness with the financial system and the economy, and at the same time its services are not substitutable at short notice. Since non-systemically important banks do not meet these conditions by definition, they ought to become insolvent in extreme cases, just as other businesses would, without placing the national economy in danger.

Under the TBTF regime, being designated a SIB entails significant additional requirements, e.g. in relation to capital, liquidity and emergency planning (see Art. 9 BankA). The Credit Suisse crisis has also made it clear that the authorities need to have access to certain additional instruments for SIBs, such as the Public Liability Backstop (PLB). Extending all the additional regulatory requirements that apply to SIBs to other banks would be contrary to the fundamental idea of proportionality in regulation.

The question concerning whether certain instruments, such as the PLB, should be extended to non-systemically important banks should also be rejected.[63] The threat to financial stability caused by several non-systemically important banks in a specific crisis can thus only be assessed on a case-by-case basis, and cannot be resolved effectively by extending the TBTF regime. The range of TBTF instruments, such as the PLB, was created for SIBs, with corresponding regulatory requirements, and was not designed to deal with a crisis at non-systemically important banks.

Deposit insurance also constitutes an instrument for limiting the impact of a bankruptcy on depositors, particularly those of non-systemically important banks.

In addition to national and international financial stability, specific crises may also give rise to regional economic risks. The cantonal banks should be mentioned here in particular, some of which have a substantial market share in their respective canton. At 14 of the 24 cantonal banks, total assets exceeded the supporting canton's annual GDP in 2021. The cantons are bearing substantial risks, depending on the market situation and the structure of the cantonal state guarantee.

The FSB is continuing its work on topics related to systemic relevance. Switzerland will be actively involved in the discussion.

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[60] The latest edition can be found in BCBS (2023): SCO40 – Global Systemically Important Banks, Version effective as of 9 November 2021

[61] See also Brief expert opinion, Brunetti, chapter 1

[62] Brief expert opinion, Brunetti, p. 12

[63] See section 10.3.2 for the group of banks to be covered by a PLB

7 Capital requirements

7.1 Introduction

Capital requirements define the minimum capital that banks are required to hold in order to adequately offset the risk of loss arising from their business operations. These capital requirements are also aimed at stopping a bank from becoming insolvent even if it suffers substantial losses. Since 2012, SIBs have been subject to higher requirements compared to other banks. These are split into "going-concern capital" for cushioning losses in ongoing operations and "additional loss-absorbing capital" (gone-concern capital) for the event of resolution.

There are two forms of capital requirements: risk-oriented (as a percentage of risk-weighted assets) and an unweighted maximum debt ratio (leverage ratio; LR). The requirements are also split between minimum capital and additional capital buffers. If the capital buffers are insufficient, the bank must show what measures will be taken to restore them and within what period of time. The requirements for SIBs also include progressive surcharges for the size and market share of a SIB – both for the risk-weighted requirement and for the LR.

The institutions must meet the requirements with eligible capital of varying quality. The highest quality is CET1 capital, which includes paid-up share capital. Although the additional Tier 1 capital (AT1) represents debt capital for accounting purposes, it is recognised as equity from a regulatory perspective, which also bears losses in the going concern. Additionally, the SIBs must hold loss-absorbing capital for the event of resolution (gone-concern capital, for instance in the form of bail-in bonds). The Total Loss Absorbing Capacity (TLAC) corresponds to the sum of going-concern and gone-concern capital. It comprises all equity and debt capital that can be used to bear losses and recapitalise in the event of restructuring or bankruptcy liquidation of a SIB.

7.2 Background

The first Swiss capital requirements specifically for SIBs were issued on 1 March 2012 at the level of the Banking Act and on 1 June 2012 at the level of the Capital Adequacy Ordinance [64] (CAO). Since then, there have been three major revisions:

i) When it came into force on 1 July 2016, the leverage ratio (LR) requirement in particular was tightened and an official separate requirement for additional loss-absorbing capital was introduced for SIBs.

ii) In the revision of 1 January 2019, a change was introduced for all banks at standalone level, which involved moving away from deducting participations (which require consolidation) from regulatory capital, and instead risk-weighting participations [65] and defining the quantitative requirements for additional loss-absorbing capital for SIBs that are not internationally active.

iii) Finally, a system change was implemented in the Banking Ordinance (BankO) on 1 January 2023 regarding the quantitative requirements for additional loss-absorbing capital for internationally active SIBs. Previously, FINMA was able to reduce the requirements for additional loss-absorbing funds if the SIBs could demonstrate that measures were highly likely to improve their resolvability (discount system). Instead, FINMA was given the option of imposing a surcharge on the requirement for additional loss-absorbing funds in the event of obstacles to resolvability.

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64 SR **952.03**

65 The two G-SIBs (Credit Suisse and UBS) were already obliged to apply risk weightings to their participations as of 2017, as a result of individual case rulings by FINMA

7.2.1 TBTF capital requirements applicable from 2012 to 2016

The CAO of 1 June 2012 introduced special provisions for SIBs for the first time in Articles 124–135. The risk-weighted requirements, which are expressed as a percentage of risk-weighted assets (RWA), were divided into a basic requirement, a capital buffer and a progressive component.

These requirements were supplemented by requirements on the countercyclical capital buffer (CCyB), which applies to all banks. New at that time and initially only for SIBs, an unweighted LR requirement was also introduced.[66] In quantitative and qualitative terms, the risk-weighted requirements consisted of the sum of:

- the basic requirement: 4.5% of RWA, to be held as CET1 capital,[67]
- the capital buffer: 8.5% of RWA, with at least 5.5% of this to be held in the form of CET1 capital and a maximum of 3% in the form of convertible capital[68] whose contractually defined trigger occurs when the CET1 capital falls below 7% of the risk-weighted items; and
- the progressive component: variable requirement of at least 1% of RWA, to be held in the form of convertible capital with a trigger of 5%.

The progressive component consisted of two separate surcharges, one for the share[69] of the Swiss market and one for the overall size of the financial group, minus a discount applied by FINMA, for measures to improve the global resolvability of the financial group. The amount of the progressive component was at least 1% of RWA. The risk-weighted requirements (4.5 + 8.5 + 1) therefore amounted to at least 14% of RWA plus the CCyB requirements.[70] The LR requirement amounted to at least 3.36% of total exposure.[71]

It soon became apparent that the TBTF regulations introduced earlier by Switzerland deviated from the BCBS's international standard in two respects:

- under international standards, convertible capital had to be of AT1 quality, whereas the CAO originally also permitted Tier 2 capital,[72] and
- the lowest possible trigger for convertible capital was set internationally at 5.125% CET1 (while low-trigger convertible capital in Switzerland required a rate of at least 5% CET1).

7.2.2 TBTF requirements from 1 July 2016

The revised version of the provisions from mid-2016 included a number of changes. A new conceptual distinction was made between two requirements:

- capital requirements for the ordinary continuation of the bank (internationally referred to as going-concern requirements); and
- requirements for additional loss-absorbing capital (gone-concern requirements).

With regard to going-concern capital requirements:

- the leverage ratio requirement was set at 4.5%;
- the required capital quality was increased to CET1 capital and AT1 instruments with a trigger of at least 7% CET1 (thereby removing supplementary, or Tier 2, capital);
- the sum of the risk-weighted requirements for minimum capital and the capital buffer was set at 12.86% for RWA; and
- the progressive component was recalibrated for the G-SIBs in such a way that, at the time of calibration, it resulted in additional requirements of 1.44% for RWA and 0.5% for the leverage ratio for each of the G-SIBs,

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66 An unweighted LR requirement for non-systemically important banks was also introduced on 1 January 2018

67 The CCyB requirement is also to be met with CET1 capital

68 In the first Swiss TBTF regulations, convertible capital could constitute both Tier 2 and Additional Tier 1 (AT1) capital (Art. 127 para. 3 CAO: "must meet at least the criteria for Tier 2 capital")

69 Measured by the higher proportion of either savings deposits or loans with a term of less than one year

70 Assuming that the progressive component corresponds to the minimum requirement of 1% of RWA

71 At that time, the LR requirement was expressed as 24% of the percentage of risk-weighted requirements (excluding the CCyB). This results in a requirement of at least 3.36% of total exposure (24% x 14%). The total exposure for the calculation of the leverage ratio is made up of balance sheet items, derivatives, securities financing transactions and off-balance sheet items

72 AT1 is a perpetual debt instrument with only the bank's cancellation option, (i.e. by analogy with CET1 capital, the investor is not entitled to repayment) Conversely, Tier 2 has a limited term, which the bank can also shorten with an option if need be.

i.e. a total of 14.3% for RWA and a 5% leverage ratio. The requirements for additional loss-absorbing capital (gone-concern requirements) only applied to G-SIBs and were basically the same as those for going-concern capital.

These requirements for additional loss-absorbing capital could now be met by bail-in bonds, in accordance with the international standards of the Financial Stability Board (FSB) on loss-absorbing funds.[73] The gone-concern requirements were reduced by means of "discounts" for measures to improve the global resolvability of the financial group.

This theoretically resulted in a total requirement – i.e. before discounts – of 28.6% for RWA and 10% for the leverage ratio for both G-SIBs.

For the SIBs, the new regulation meant that (with the granting of transitional provisions[74]):

- the internationally non-existent convertible capital instruments with a low trigger (5% of CET1) were no longer eligible as going-concern capital; and
- convertible capital with Tier 2 quality was no longer eligible for meeting going-concern capital requirements for SIBs.

7.2.3 Amendments to the 2018 and 2019 TBTF regulations

7.2.3.1 Risk weighting of participations in the financial sector

Until this amendment to the CAO, Article 32 CAO required all banks to deduct participations in the financial industry held and consolidated at group level from CET1 capital in the standalone calculation with effect from 2019. Implementing this strict rule posed a major challenge for Credit Suisse and UBS, as they had very high participations worth CHF 75 billion and CHF 45 billion respectively. FINMA therefore granted exemptions in accordance with Article 125 CAO so that the full deduction for participations was never applied. The amendment to the CAO, which came into force on 1 January 2019, introduced instead a risk-weighting-based capital adequacy requirement for all banks on their participations for consolidation.

FINMA gave both G-SIBs 10-year transitional arrangements lasting until 1 January 2028. This increases the risk weighting for Swiss participations annually by 5 percentage points from the original 200% to the final 250%. For foreign participations, it increases annually by 20 percentage points from 200% to the final 400%. After five increases, the risk weighting in 2023 was 225% for Swiss participations and 300% for foreign participations.

G-SIBs must disclose this mechanism on a quarterly basis in the "regulatory disclosures subsidiaries", which enables the annual additional capital requirement of each bank to be calculated precisely. The transitional arrangements resulted in an annual additional capital requirement for Credit Suisse of significantly more than CHF 1 billion in CET1 capital.

The switch to the – less stringent – system of risk weighting participations meant that the discount provisions under Article 125 CAO could be repealed. Until then, Article 125 provided that FINMA would grant the bank capital discounts at standalone level if compliance with the (ordinary) requirements at standalone resulted in the requirements at financial group level being exceeded. If the requirement had applied at the same amount at both standalone and group level, the capital backing of the intragroup items would have resulted in such an excess requirement at group level.[75] In 2011, the G-SIBs argued in the Council of States Economic Affairs and Taxation Committee (EATC-S) that without a discount, i.e. with a uniform risk-weighted total requirement at single-entity and group level (19%[76]), the de facto requirement at group level would have been 26% in the case of Credit Suisse and 23% in the case of UBS.[77] The politically desired Article 125 CAO on discount provisions, created in 2012, was only repealed with the amendment to the TBTF regulations in 2019.

[73] FSB press release, FSB issues final Total Loss-Absorbing Capacity standard for global systemically important banks, 9 November 2015

[74] In principle until 31 December 2019 at the latest, with deviations depending on the specific design of the capital instrument

[75] At standalone level, intragroup debts must be backed by capital (they also result in a lengthening of the aggregated balance sheet). At the consolidated level, such debts/liabilities no longer apply and therefore do not have to be backed by capital

[76] A risk-weighted capital adequacy requirement totalling 19% was proposed in the final report published by the committee of experts appointed by the Swiss Federal Council to examine ways of limiting economic risks posed by large companies, on 20 September 2010

[77] Schöchli, "26 statt 19 Prozent?", Neue Zürcher Zeitung article, 12 May 2011

7.2.3.2 Specification of the gone-concern requirements for SIBs which are not internationally active

Since 2019, the CAO has also stipulated requirements for additional loss-absorbing capital (gone-concern requirements) for SIBs that are not internationally active. These are set at 40% of the capital requirements for the orderly continuation of the bank (going-concern requirements). FINMA also set a sufficiently high recapitalisation capacity as a criterion for a viable emergency plan. As at the beginning of 2023, two of the three SIBs which are not internationally active met this requirement.[78]

7.2.4 Replacement of the discount system for G-SIBs from 1 January 2023

With the amendment to the BankO on 1 January 2023, the previous discount system for improving the resolvability of G-SIBs was replaced by a new incentive system. The G-SIBs had reached the maximum possible discount, which meant that the incentive effect of the discount system was exhausted. The change of system led to various amendments in the CAO.

Firstly, the gone-concern requirement, which previously corresponded to a 100% mirroring of the going-concern requirement less a discount, was replaced by a fixed 75% mirroring of the going-concern requirement. As a lower limit, this 75% mirroring ensures that the requirements of the FSB's TLAC Standard,[79] which have been in force since 1 January 2022, are met.

Secondly, FINMA can now demand additional loss-absorbing funds if it identifies obstacles to resolvability. This incentivises banks to maintain their resolvability. This applies at financial group level and at parent bank level. As the entity responsible for the systemically important functions, the Swiss entity is subject to the emergency planning requirements.

7.2.5 Current requirements for SIBs

In 2022, UBS reported a going-concern requirement totalling 14.3% for RWA and 5% for the leverage ratio (excluding CCyB and Pillar 2 surcharge).[80] This requirement includes surcharges for market share and for bank size measured by total exposure, based on the conditions prior to the takeover, of 0.72% (RWA) and 0.25% (LR) for each.

Due to the new size of UBS, the surcharges for market share[81] would be 1.44% (RWA) and 0.5% (LR), and for total exposure 1.44% (RWA) and 0.5% (LR). In total, this would now result in a doubling of the surcharge to 2.88% (RWA) and 1% (LR). The going-concern requirement is thus now 15.74% RWA and 5.5% LR. FINMA has given UBS a transitional period until 2030 to meet the full requirements of the CAO, which have increased due to the takeover.

Of the three SIBs which are not active internationally, only the Raiffeisen Group has so far had to meet a market share surcharge based on savings deposits. Apart from this, the requirements for these three institutions do not differ. Under a transitional provision of the CAO (Art. 148j let. e), the requirements on additional loss-absorbing capital for non-internationally active SIBs in 2023 are 3.2% RWA and 1.05% LR.

On 29 November 2023, the Federal Council adopted the amendment to the CAO to implement the standards of Final Basel III. It enters into force on 1 January 2025.[82] In particular, the reform aims to ensure that higher-risk items need to be backed by more capital and lower-risk items by less capital. Table 3 shows the current capital requirements for SIBs.

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[78] FINMA press release, FINMA assesses the recovery and resolution plans of systemically important institutions again, 26 April 2023

[79] FSB, Total Loss-Absorbing Capacity standard for global systemically important banks, 9 November 2015

[80] UBS, UBS's third-quarter 2023 results, 7 November 2023, p. 42

[81] It is assumed that UBS is M5 in accordance with Annex 9 of the CAO. FINMA's exact calculation is not known to the FDF

[82] AS **2024** 13

Bank*	Going-concern requirements		Gone-concern requirements	
	RWA	LR	RWA	LR
UBS	15.74 %	5.5 %	11.81 %	4.125 %
Raiffeisen	13.22 %	4.63 %	5.29 %	1.85 %
ZKB	12.86 %	4.5 %	5.14 %	1.8 %
PostFinance	12.86 %	4.5 %	5.14 %	1.8 %

* The requirements are shown without Pillar 2 surcharges or surcharges for the CCyB. FINMA has given UBS a transitional period until 2030 to meet the increased requirements following the takeover of Credit Suisse. Gone-concern requirements for non-internationally active SIBs are shown as at end-2026, and do not include the transitional provision.
Source: FINMA

Table 3: Capital requirements for SIBs as at end-2026

7.3 International comparison

7.3.1 Capital requirements for UBS and foreign comparator banks

The capital requirements are compared below with regard to both RWA and LR (see Figure 4 and Figure 5). The figures compare the international BCBS standard with the requirements for UBS and Credit Suisse prior to the takeover and the requirements for UBS after the takeover, which hypothetically – i.e. assuming constant size and market share – will apply from 2030 after the end of the transition period. The comparison also includes the requirements in the EU, UK and USA, and uses example banks which are comparable with UBS[83] (Deutsche Bank in the EU; Barclays in the UK; Morgan Stanley in the USA). According to the FSB's categorisation of G-SIBs into different categories, both Deutsche Bank and Barclays are, like UBS, in bucket 2 and Morgan Stanley is in bucket 1.[84]

The following points should be noted with regard to the figures:

- Total capital represents the requirements for going-concern capital. TLAC (or MREL) illustrates the total loss-absorbing capital consisting of going-concern and gone-concern capital.
- The requirements are based on the published figures for the first quarter of 2023. They do not include any requirements relating to countercyclical buffers.
- The international BCBS standard is shown for banks with a comparable business model and of a comparable size to UBS and Credit Suisse.

The comparison shows that the Swiss going-concern requirements including a buffer (total capital) for both G-SIBs prior to the takeover were somewhat lower than the corresponding requirements abroad. The proportion to be held in CET1 is slightly lower. However, compared to foreign peer banks, Swiss G-SIBs can use more AT1 instruments to meet the buffer requirements.

Switzerland complies with the international TLAC minimum standard relating to gone-concern requirements for G-SIBs. The comparison shows that the EU and the UK have similarly high requirements, taking into account the buffer requirements, while the USA has slightly lower requirements.

Following the merger with Credit Suisse, UBS will have a similar level of going-concern requirements and significantly higher TLAC requirements overall than the foreign peer banks once the transition period ends in 2030, as a result of the doubling of the surcharges for market share and total exposure.

[83] This corresponds to the practice in previous reports, in accordance with Article 52 BankA

[84] FSB, 2023 List of Global Systemically Important Banks (G-SIBs), 27 November 2023

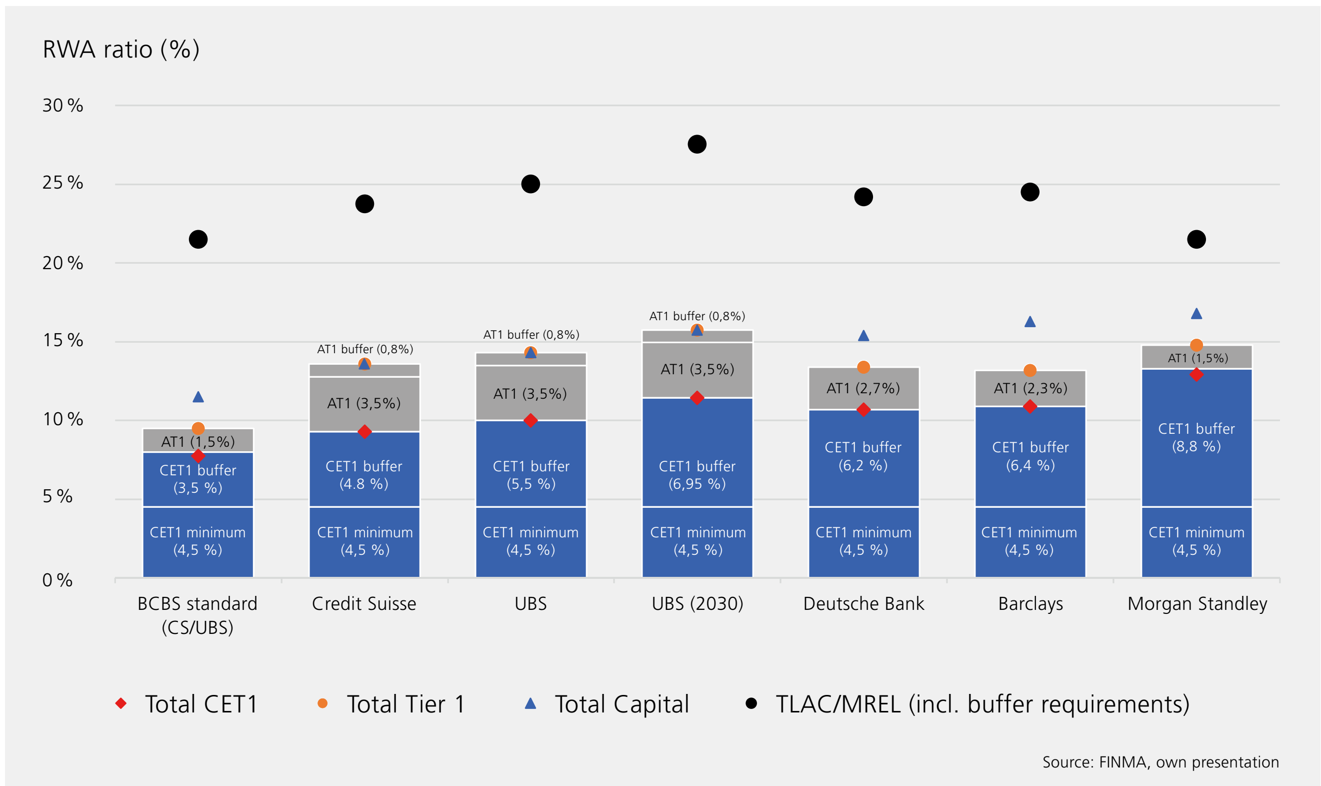


Figure 4: International comparison of risk-weighted capital requirements for Swiss G-SIBs and comparable banks in the EU

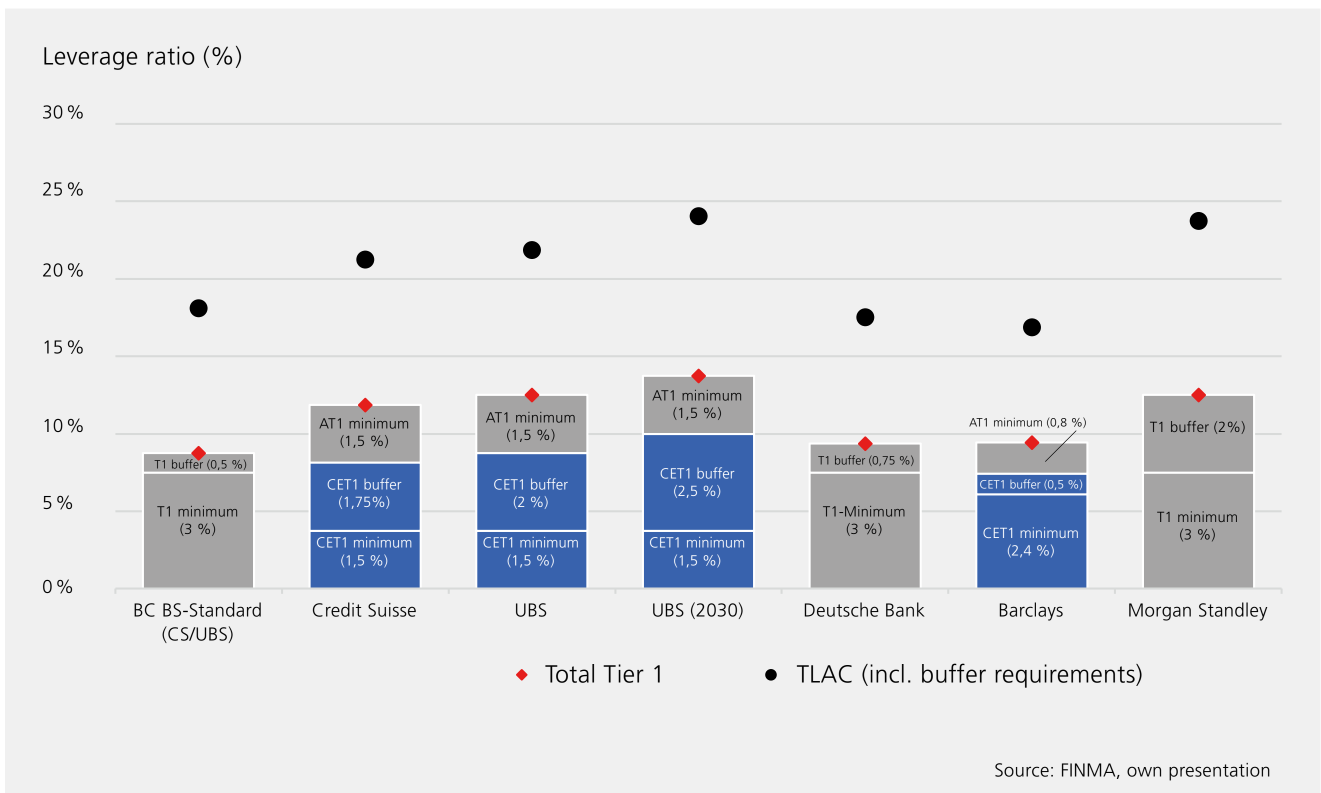


Figure 5: International comparison of leverage ratio requirements for Swiss G-SIBsand comparable banks in the EU, UK and USA as at 1 March 2023

7.3.2 Capital requirements for parent banks

7.3.2.1 In the international context

Compared to foreign peer banks, the parent bank is a particular focus for Swiss G-SIBs for two reasons:

- Firstly, the significance of foreign subsidiaries at the two parent banks was/is high in relation to the group as a whole. A substantial proportion of the business activities, risks, income and capital are located in the subsidiaries in the USA and (in the case of Credit Suisse) in the UK. There are other G-SIBs which also have subsidiaries outside their home jurisdiction. However, they are relatively smaller than the two Swiss institutions.
- Secondly, the parent banks themselves also conduct banking business on a large scale and are not purely holding companies. Other jurisdictions (e.g. the USA or UK) provide for restrictions here (see remarks on "clean holding" in section 14.4.2).

7.3.2.2 Parent requirements under the CAO compared to the Basel minimum standards

The Basel minimum standards do not contain any specifications on the capital requirements for the parent banks of international banking groups. However, approaches can be drawn from the general requirements of the minimum standards for the treatment of non-consolidated participations. According to these, participations in equities (CET1, AT1 or bail-in capital) are to be deducted from the parent bank's corresponding capital component.[85] Share capital (CET1) of subsidiaries may be risk-weighted at 250% up to a threshold of 10% of the parent bank's Tier 1 capital.[86]

The FSB provides for a deduction of internal TLAC instruments or an equally strict supervisory approach for parent banks of international banking groups. This implies, among other things, a capital deduction for participations.[87]

The requirements of the Basel minimum standard formed the basis for the parent capital regime in Switzerland. In accordance with Article 124 CAO, the parent banks' percentage capital requirements correspond to the percentage requirements of the top level of the financial group. The calculation for parent banks' capital requirements differs from the group approach primarily in the treatment of intragroup items. While all intragroup participations and items (loans and liabilities) are recognised on the standalone balance sheet of the parent banks, none of the intragroup participations and items are recognised in the group view and neither is the associated capital. The balance sheet is therefore shorter in the group view, which means that the calculation basis for the required capital and therefore also the capital adequacy requirements are smaller.

The combined standalone requirements thus exceeded the group requirements, at which point FINMA applied a discount based on the then Article 125 CAO (see section 7.2.3.1). However, these relaxations had to be granted very comprehensively in order to prevent the combined standalone requirements from exceeding the group requirements. Before the discontinuation of Article 125 CAO, this meant that the relaxed requirements for Credit Suisse were in effect applicable to all the participations.

As shown in section 7.2.3.1, pure risk weighting was introduced in 2018 for participations, with a phase-in until 1 January 2028. Consequently, the risk weighting increases steadily to 400% for foreign participations and 250% for domestic participations. In combination with the special requirements for SIBs, this means that the two parent banks will have to back around 60% of their participations with capital (after the transitional periods have expired; see Box 3).

[85] BIS, Basel Framework, Definition of Capital, CAP 30.30

[86] BIS, Basel Framework, Definition of Capital, CAP 30.31 ff.

[87] FSB, Guiding Principles on the Internal Total Loss-absorbing Capacity of G-SIBs ("Internal TLAC"), 6 July 2017, p. 13, in particular Principle 10: *"To avoid possible double counting, authorities should consider applying an internal TLAC deduction approach or an equivalently robust supervisory approach."*

Box 3: Capital adequacy of subsidiaries

In accordance with capital adequacy requirements, a bank must back its business activities (in particular its assets) with capital. The amount of capital required is determined on the basis of risk (RWA).

This principle applies both to the group (in the consolidated financial statements) and to each individual group entity that holds a banking licence (namely the parent bank, also known as the parent entity or parent company, and the subsidiaries in Switzerland and abroad).

Group structures contain various elements of financial interconnectedness between the entities by way of intragroup items, which play a role in capital adequacy. Particular attention should be drawn to participations at parent bank level, which are an important source of capital at subsidiary level.

Group structure of G-SIBs in Switzerland
Both UBS and Credit Suisse have or had a group structure topped by a group (holding) company (see Figure 7, Figure 9 and chapter 14). In both cases, immediately below this level there is a central entity, the parent bank, which conducts banking business directly as well as holding participations in various subsidiaries in Switzerland and abroad. The Swiss entity, which performs the systemically important functions in Switzerland, is one of these subsidiaries.

Current regulation of partial capital adequacy
Using the example of a banking group that consists of a parent bank and a wholly owned foreign subsidiary below the top-level group company, the currently applicable regulatory capital requirements are explained in a simplified manner below.

The foreign subsidiary must back its business activities with capital; the definitive regulatory capital requirements are those of the subsidiary's country. The subsidiary's capital mainly comes from the parent bank and is recognised on the latter's balance sheet as a participation on the assets side (see the following chart).

Balance sheet of foreign subsidiary

Assets **Liabilities**

Debt

Subsidiary's regulatory capital

Capitalisation by parent bank*

Balance sheet of parent bank

Assets **Liabilities**

Assets excl. participation in subsidiary

Debt

Parent's regulatory capital for own operations

Participation in subsidiary

Debt

Parent's regulatory capital for participation

Participation: partly backed with capital (approx. 60%)

* The positions for the subsidiary's capital and the participation are the same size here, for simplicity's sake. This is not necessarily the case in reality, for example due to different valuations.

According to current requirements, approximately 60% of the participations in a foreign subsidiary require capital backing by the parent bank. This figure is calculated by multiplying the risk weighting for participations (400%, see section 7.2.3.1) by the capital requirement as a percentage of RWA (base requirement of 12.86% plus progressive surcharges; 15% in this example). The remaining 40% of the capital for the foreign subsidiary can be refinanced using borrowed capital.

Based on the currently applicable capital requirements, an asset in the subsidiary must therefore be backed by significantly less capital than if the same asset were recognised in the parent bank itself. The current requirements allow what is known as double leveraging, in which the group’s own funds are partly financed with borrowed capital.

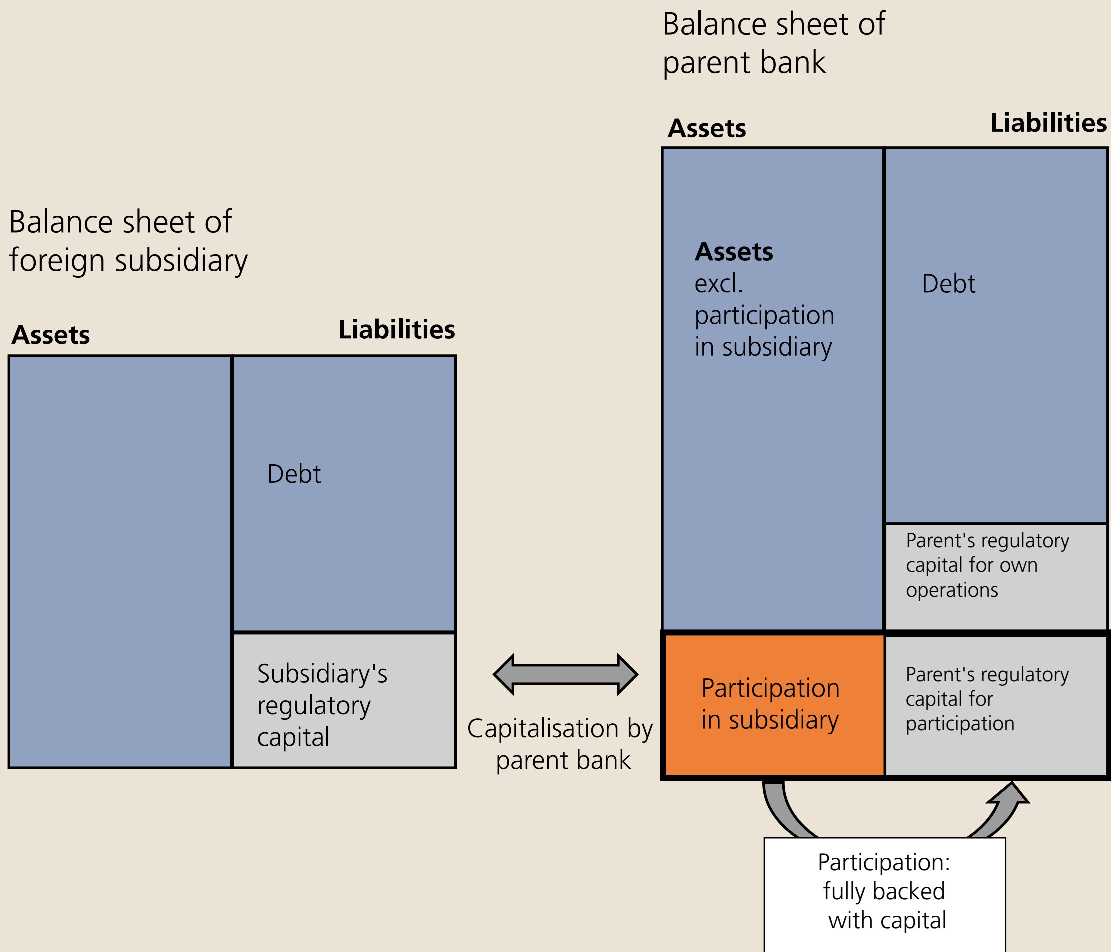
Increasing the capital backing for participations

Adjusting the capital requirements for participations, as explained in section 7.5.1 and proposed by the Federal Council (measure 15) increases the capitalisation of the parent bank and reduces the incentive to have complex company structures.

The following illustration shows an example of the increase in capital backing based on full backing of the participations (i.e. 100%) on the assets side of the parent bank's balance sheet.

Full capital backing can be guaranteed with what is known as a participation deduction. The value of the participations is deducted from the parent bank's eligible capital. At the same time, the participations are no longer risk-weighted and therefore do not increase the RWA.

Alternatively, full capitalisation of participations in foreign subsidiaries can also be achieved by increasing the risk weights for the capital backing of such participations.



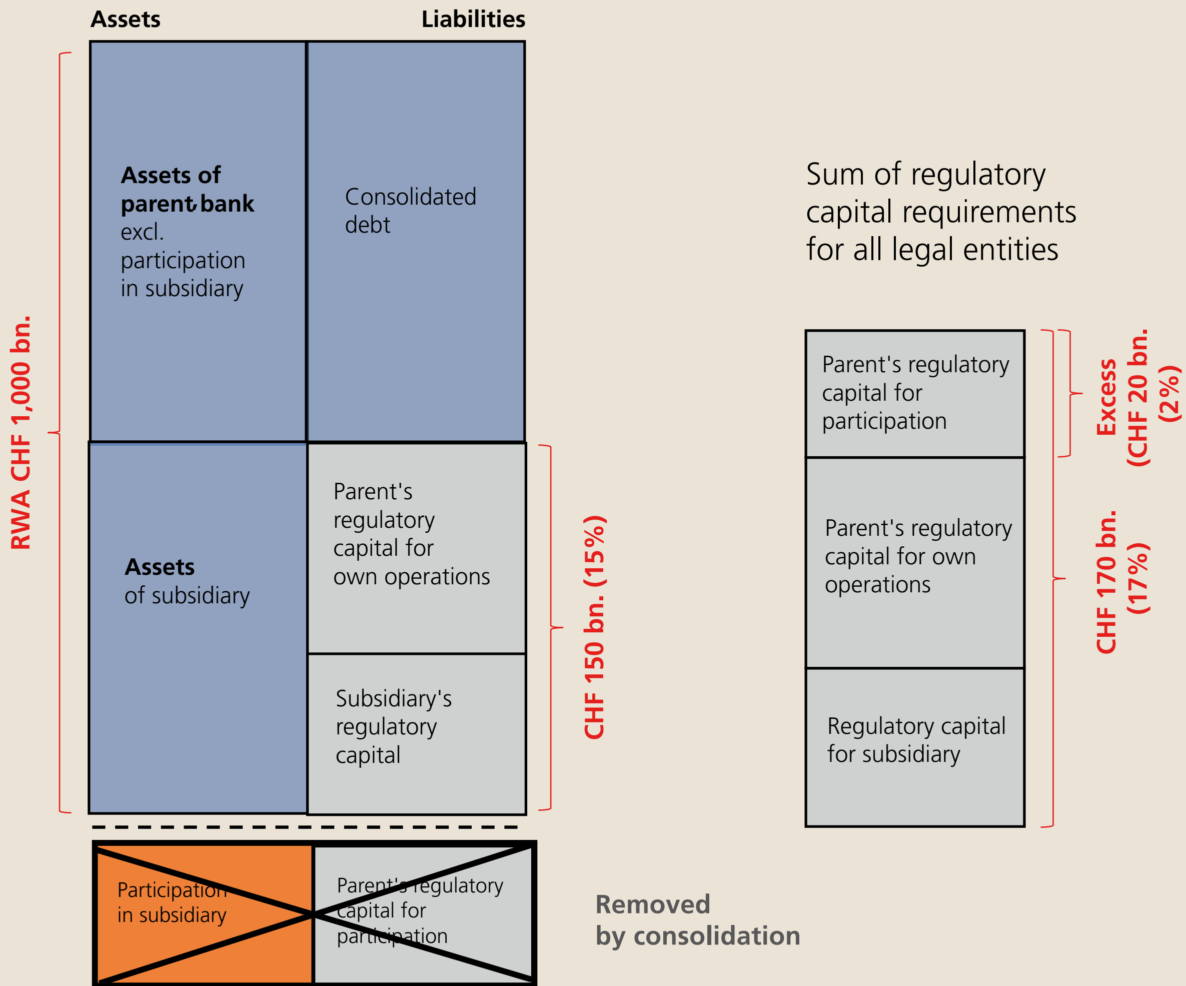
Capital requirements at group level (consolidated level) and surpluses

Capital requirements for intragroup items such as participations at parent bank level lead to the effect of "overshooting" at group level. This effect, which results in significantly higher reported capital ratios compared to the requirements at group level, is relevant and increases with higher requirements and more complex group structures. "Overshooting" is therefore a deliberate consequence of regulation. Based on the example above, the phenomenon of "overshooting" is explained below and illustrated using fictitious figures.

When calculating the group's capital requirements – i.e. on a consolidated basis – the assets and liabilities of the parent bank and subsidiary/ies are combined. Intragroup receivables and liabilities are thereby offset. The participations that appear as assets for the parent bank also disappear on a consolidated balance sheet. As this reduces the total assets, the capital requirement under the Capital Adequacy Ordinance for the consolidated banking group is also reduced compared to the total capital requirement for the parent bank and subsidiary.

Overall, the sum of the capital requirements of the individual legal entities is therefore greater than the capital requirement that applies to the group's consolidated balance sheet. This phenomenon is referred to as "overshooting" the group's capital adequacy requirement.

Compliance with the requirements in the individual entities of the banking group prior to consolidation automatically leads to overcompliance with the consolidated requirement at group level. This effect already exists today and increases with a higher or complete capital backing of participations or an expansion of the subsidiaries.



* The principle illustrated schematically using participations also applies for intragroup receivables.
The higher the capital requirements for corresponding intragroup receivables, the higher the overshooting.

The example balance sheet above shows risk-weighted assets of CHF 1,000 billion. With an RWA requirement of 15 %, this results in required capital of CHF 150 billion at group level. However, as the parent bank is required to hold regulatory capital totalling CHF 20 billion for the participation in the subsidiary, which is not shown on the consolidated balance sheet, the group's actual capital requirement is CHF 170 billion. If this is set in relation to the risk-weighted assets of CHF 1,000 billion, the result is a capital ratio of 17 %. As a result, the RWA ratio at group level "overshoots" by 2 % or CHF 20 billion.

7.4 Assessment

7.4.1 Positive effects in the crisis

7.4.1.1 Level of capital requirements and the capital quality requirements

The capital adequacy requirements for Swiss SIBs are based on international standards. As Figure 3 and Figure 4 demonstrate, the requirements for Swiss G-SIBs even tend to be higher than those for G-SIBs in other jurisdictions.

The special requirements for the two Swiss G-SIBs and the associated capital buffers at group level increased their resilience.[88] Thanks to these buffers, Credit Suisse was able to survive several setbacks and considerable losses over a long period of time. UBS's strong capitalisation was also imperative for the takeover of Credit Suisse.

At the same time, Credit Suisse regularly aimed, and UBS still aims, for higher CET1 ratios than the minimum required by the regulations.[89] This also takes into account market expectations with regard to adequate CET1 capitalisation of G-SIBs. In order to meet these expectations and the associated CET1 targets, despite a series of poor quarterly results, Credit Suisse took a number of actions, including limiting dividend payments, discontinuing share buy-backs and carrying out a capital increase in 2022. These were also intended to contribute towards funding the restructuring plan.

7.4.1.2 Progressive component

Both the risk-weighted and the unweighted capital requirements of the SIBs contain a progressive component. This consists of surcharges for the market share in Switzerland and for the overall size of the financial group. These components are very likely to have contributed to the fact that the Swiss G-SIBs have significantly reduced their total assets in recent years (see Figure 2). This instrument has thus contributed to alleviating the TBTF issue.

The progressive component also has a substantial effect on the takeover of Credit Suisse by UBS. As a result of the merger of the two G-SIBs, UBS's progressive component is expected to lead to a 10% increase in the TLAC requirements (see Figure 3 and Figure 4), which it will need to meet once the transitional period granted by FINMA expires in 2030.

7.4.1.3 AT1 capital

The write-down of Credit Suisse's AT1 instruments, which is provided for in the contractual provisions of these instruments in the event of government support, used an important instrument which was introduced with the TBTF regulations and also at international level in the Basel III standards.

The write-down of the instruments was carried out by Credit Suisse and served two important objectives which were the reasons behind this instrument being introduced in the TBTF legal framework. Firstly, it meant that AT1 holders also contributed towards Credit Suisse's recovery as part of the state support for a SIB. Secondly, the associated creation of CET1 capital was crucial for providing the room for manoeuvre needed to absorb Credit Suisse's ongoing losses and vital for implementing the measures to ensure national and international financial stability.

7.4.1.4 Bail-in capacity

With the existing bail-in capacity, Credit Suisse's CET1 could have been further increased by means of a (partial) bail-in if the authorities had deemed a restructuring to be the most expedient option or if the solution of a takeover by UBS had failed. An adequate volume of bail-in (gone-concern) capacity is a necessary (but insufficient) precondition for the successful resolution of a SIB.

7.4.1.5 Disclosure requirements

The disclosure requirements relating to capital ratios generally have a disciplinary effect with regard to the dividend policy, as the banks want to show a buffer that is above the regulatory requirements. In times of crisis, however, it can also have a negative effect (higher refinancing surcharges or increased share price volatility) when it severely limits the prospect of distributable profits.

[88] A higher Tier 1 capital target than the regulatory requirement was set for Credit Suisse by FINMA, on the basis of stress test results

[89] As at Q1 2023, UBS reported a CET1 ratio of 13.9% against a requirement of 10% (this does not take into account requirements related to the countercyclical capital buffer). It set a CET1 ratio target of 13% for Q4 2022. As at Q1 2022, Credit Suisse reported a CET1 ratio of 13.8%, also against a requirement of 10% at the time (again, this did not take into account the requirements related to the countercyclical capital buffer, nor a Pillar 2 add-on of 0.67% at the time). As part of its strategic transformation, Credit Suisse had announced that it was aiming for a CET1 ratio of at least 13% for the period 2023-2025 and at least 13.5% from 2026, (against the then CET1 requirement of 9.3% and a CET1 ratio of 12.6%)

7.4.2 Lessons learnt from the crisis and the need for action

7.4.2.1 Capital ratios are point-in-time observations

Compliance with regulatory capital ratios does not in itself guarantee confidence in the bank.[90] It is critical to understand that regulatory ratios exactly reflect a bank's capitalisation only at a specific point in time and based on regulatory definitions. They are sometimes difficult to interpret and are only forward-looking to a limited extent.

With this in mind, the focus on regulatory ratios appears to be too narrow, since it does not take into account more forward-looking factors (e.g. market capitalisation, credit default swap [CDS] premia, profitability, stress tests, corporate governance, the business model) and the information these contain. This is particularly relevant if such factors are giving out different signals on the resilience of an institution when compared to the regulatory ratios.

In the case of Credit Suisse, FINMA did apply surcharges based on a forward-looking view of the risk profile, which increased the capital requirements. However, there are no clear rules on institution-specific surcharges that take effect immediately and cannot be delayed by years of legal disputes. This is in contrast to liquidity, where the most recent revisions of the LiqO have explicitly provided for institution-specific surcharges.

Furthermore, a SIB's increased risks which result from weak risk management or weak corporate governance should also be covered by increased capital within this concept.

7.4.2.2 Parent bank capitalisation as a critical vulnerability

For a long time, the calibration of capital requirements focused on the consolidated group in order to ensure an international level playing field (see section 2.2.3.1 on Art. 125 CAO). Although the single entity is also required to meet the capital requirements, various discounts have been and continue to be applied, particularly for parent banks.

For example, in order to provide relief, the regulations stipulate that participations by the parent bank do not have to be fully backed by capital (see Box 3).[91] Thus, the banks can save on capital by shifting business activities to subsidiaries. Specifically, the capital required in the subsidiary can be partly funded by the parent bank through debt, which is cheaper. Due to the complex vertical group structure of the two Swiss G-SIBs, such discount provisions tend not to be the focus of public attention. They are also less problematic in non-crisis times, as the group tends to be viewed as a whole. In times of crisis, however, the focus can quickly shift from the group to single entities and the capitalisation of these entities can come to the fore. In the worst case, if the parent bank has to absorb a subsidiary's losses, they are only partly covered by its own funds.

In particular with a G-SIB such as Credit Suisse, the complex group structure and the discounts applied led to a structurally weak capitalisation of the parent bank, which instead of being a source of strength for the group, was a weakness. This was also increasingly understood by the market.

During the Credit Suisse crisis, in which foreign participations in particular had to be revalued and consequently written down significantly, this incomplete capital backing of foreign participations also meant that the strategic room for manoeuvre was critically restricted. Disposal of foreign participations, even if both desirable for recovery and liberating in a crisis, became impossible, as the consequences would be hard for the parent bank's capital base to withstand. The sale of foreign business divisions would have led to further write-downs on participations. However, as these participations were not fully backed by capital in the parent bank, a write-down would have quickly led to a shortfall in the parent bank's capital requirement.

Any ring-fencing measures taken by foreign authorities would have had the same effect. Had foreign authorities decided to separate the local subsidiaries from the group and wind them down, instead of supporting a restructuring of the entire group under FINMA's leadership, these

[90] The Expert Group on Banking Stability also concluded that in the case of Credit Suisse, despite compliance with the regulatory ratios, there were justified suspicions that the bank was less well capitalised than the aggregated figures indicate. The need for reform after the demise of Credit Suisse, 1 September 2023, p. 70

[91] Originally, the Capital Adequacy Ordinance provided for full capital backing for participations by requiring them to be deducted from capital (then Art. 32 let. j CAO). Since Credit Suisse and UBS had very high participations worth CHF 75 billion and CHF 45 billion respectively, implementing this strict rule was a major challenge for them. FINMA therefore granted exemptions in accordance with Article 125 CAO so that the full deduction for participations was never applied. With the 2018 revision and the new CAO which entered into force on 1 January 2019, a change was made in favour of risk weighting participations instead of deducting them (see Annex 4, sections 1.6 and 1.7 CAO). Risk weighting participations meant that they needed less capital to back them (according to estimates at the time, around 50% after the transition period ended). At international level, the FSB recommends full backing of internal TLAC with external TLAC or a corresponding deduction method (see section 2.3.2.2)

participations would very likely have become worthless in the parent bank's balance sheet and this would have resulted in a loss for the parent bank in the full amount of the participations. However, as the parent bank was only required to hold capital for a portion of the participations, a substantial capital gap would have arisen at the parent bank. In the event of the parent bank becoming insolvent (e.g. if the emergency plan were triggered), its customers and creditors would have suffered high losses in the bankruptcy proceedings, while those of the subsidiaries would have been better off.

Intricate group structures also enable what is known as double leveraging, which can lead to unhealthy "optimisation" of capital. For example, debt capital can be raised externally and passed on internally as equity. The double leverage ratio, which measures this, is increased as a result. Although FINMA managed to reach an agreement with Credit Suisse to restrict double leveraging, there are no clear provisions at legislative or ordinance level that restrict or prohibit this optimisation.

7.4.2.3 Prudent valuation and recoverability of balance sheet items

The loss-absorbing capacity of CET1 capital may not be sufficiently transparent for market participants, as it is influenced by regulatory valuation standards and regulatory filters. This is relevant for a number of assets on bank balance sheets, such as participations, software, deferred tax assets, financial assets held to maturity and other assets.

There is also uncertainty regarding fair-value items that are hard to value (those without current market prices or observable valuation parameters). The Basel minimum standard provides for prudent valuation adjustments (PVAs). UBS's valuation adjustments on such items following the takeover of Credit Suisse demonstrate the high level of discretionary powers held by the banks. For example, UBS adjusted the fair value items of Credit Suisse during the takeover, which reduced CET1 capital by CHF 2.2 billion. These corrections were far higher than the PVAs of CHF 271 million that Credit Suisse had reported at the end of 2022.

UBS increased its accounting provisions for legal risks by USD 4.5 billion and reduced the value of software by USD 2 billion when it acquired Credit Suisse. UBS also adjusted the value of the loan commitments and guarantees acquired from Credit Suisse by USD 4.5 billion as part of the takeover. In total, such valuation adjustments on the acquisition reduced CET1 by USD 16.8 billion. Most of these were value adjustments that became necessary in the course of the merger due to the amalgamation of two banking groups.[92]

The rules for calculating PVAs are more rigid in the EU than in Switzerland. Since 2014, large banks in the EU have had to calculate PVAs in accordance with the core approach. If there is uncertainty about the fair value of an item, the PVAs must be calibrated in such a way that a prudent valuation can be made with 90% certainty. Due to these stricter rules, European comparator banks also have relatively high PVAs. At HSBC, Barclays, Deutsche Bank, Société Générale and BNP Paribas, the median of these adjustments at the end of 2022 was USD 1.6 billion.

There are also stricter rules in the EU than in Switzerland regarding the eligibility of software. For example, EU banks may recognise software capitalised in their balance sheet as CET1, but must write it off in full within a maximum of three years for their capital resource calculation, irrespective of the accounting treatment. For the Swiss banks, only the accounting standards are authoritative in this respect.

Such differences are particularly relevant against the backdrop of the banks' high level of debt. With a leverage ratio of 5% to 6%, even small valuation corrections have a major impact on a bank's capital situation.

[92] This figure already includes compensation of USD 5 billion, which was awarded by FINMA, mainly for interest-related value adjustments on loans. UBS must reduce this compensation in full and on a straight-line basis to zero by 30 June 2027. As part of the merger, UBS converted the assets and liabilities recognised by Credit Suisse in accordance with US GAAP to the IFRS accounting standard used by UBS. When businesses are combined, the acquirer (in accordance with IFRS 3 "Business Combinations") must recognise all identifiable assets acquired and liabilities assumed, including contingent liabilities, at their respective fair values at the acquisition date or the completion date. Specifically, this led to adjustments in the valuation of assets and liabilities (fair value adjustments) of -USD 14.7 billion, additional provisions for potential outflows arising from legal disputes and regulatory or similar matters of USD -4.5 billion, value adjustments on intangible assets of USD -0.9 billion and fair value adjustments on non-financial assets and liabilities of USD -0.6 billion. There were also valuation adjustments totalling USD -4.1 billion as a result of the change in accounting standards from US GAAP to IFRS. Overall, the merger resulted in net value adjustments in equity under commercial law of USD 24.8 billion. Regulatory CET1 capital fell by USD 16.8 billion

7.4.2.4 The loss-absorbing role of AT1 in a going concern

For regulatory purposes, bonds issued by banks can only be counted as AT1 and thus towards meeting the capital requirements under a number of strict conditions. In Switzerland, these requirements are legally enshrined in the CAO – in strict accordance with the BCBS standard. In order for a bond to count as AT1 for regulatory purposes, it must be ensured, in addition to numerous other requirements being met in accordance with Articles 27 and 29 CAO:

- that a bond's duration is perpetual and the bank raises no expectation of repayment (Art. 27 para. 1 let. b CAO), and
- that it is contractually stipulated that write-off instruments must be written down or, in the case of convertible instruments, converted into shares, at the latest when there is recourse to public sector assistance or when FINMA orders this to avoid insolvency.

However, as the BCBS points out in its findings on the banking crises of 2023,[93] a market practice has developed at international level in which bonds that are perpetual in accordance with regulatory requirements are repaid and replaced on a regular basis or even at the first possible opportunity. This has led to false market expectations that could prove fatal in a crisis.

For example, Credit Suisse wanted to avoid sending a negative signal to the markets by not recalling instruments at the earliest possible date and replacing them with more expensive ones, even if conditions were unfavourable. Fearing a market reaction, it also refrained from deferring coupon payments, although this would have significantly helped to ease the tense liquidity situation during the recovery phase, and the contract documentation contains binding provisions to that effect.

This meant that the AT1 capital instruments were not able to have their intended impact on stabilising the bank's ongoing operations in the early stages of the crisis and in 2022 in particular. On the contrary, they actually increased the financial pressure on the bank due to the expectations of market participants. It can be assumed that this problem was not specific to Credit Suisse, but will also arise in future crises and must therefore be addressed internationally (see also the BCBS findings).

AT1 instruments may provide for a write-down or conversion into equity at the issuer's discretion if a trigger event occurs; this is specified in the contract terms for the AT1 instruments upon issuance. Credit Suisse had decided in favour of issuing write-off instruments, probably taking market preferences into account. In March 2023, all of its outstanding AT1 instruments were of this nature. Investors were aware, or should have been aware, that Credit Suisse's instruments provide for a full write-down. The terms of the Credit Suisse AT1 instruments repeatedly referred to this and the high risks. However, despite the significant risk premia to compensate for the high risk, some AT1 investors were surprised that, under certain circumstances – as stipulated in the contractual terms and in accordance with the regulatory requirements for AT1 capital – the bonds had to absorb losses.

Another aspect that was less prominent during the Credit Suisse crisis is the CET1 ratio threshold, below which the bonds are "automatically" written down or converted in accordance with contractual provisions. Under the CAO, this threshold – in line with the BCBS standard – must be at least a CET1 ratio of 5.125%. The threshold for the critical CET1 ratio for Credit Suisse's AT1 instruments was 5.125% in some cases and 7% in others.

However, the markets appear to expect a higher CET1 ratio and could still lose confidence in a G-SIB even if it had a significantly higher CET1 ratio. Indeed, Credit Suisse was an example of how a G-SIB can be threatened with insolvency even with a much higher CET1 ratio if confidence is lacking. Based on this, the regulatory requirements for AT1 capital urgently need to be critically reviewed at international level.

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[93] BCBS, Report on the 2023 banking turmoil, 5 October 2023

7.5 Possible measures

7.5.1 Strengthen the capital backing for foreign participations, and thus for parent banks, within a financial group

Treatment of subsidiaries to be consolidated at group level is of key importance to the capitalisation of the parent bank. One possible capital-related measure is to adjust the capital requirement for all participations or specifically foreign participations in order to strengthen the parent bank.

The strictest and most far-reaching option for strengthening the parent bank would be to revert to fully deducting participations from eligible capital, as previously provided for in the TBTF regime. If applied consistently, this would lead to full capital backing of equity participations. Alternatively, capitalisation could be equally or partly strengthened by increasing the risk weights for participations.

This measure and a corresponding strengthening of the parent bank has several key advantages:

- It ensures that capital that is passed on to subsidiaries cannot simultaneously be used as capital for other risks at the level of the parent bank, or only to a much smaller extent. This increases the strategic room for manoeuvre in a crisis, as participations that have lost significant value can be sold if necessary, without serious consequences for the parent bank's capital. This has a significant impact on foreign participations in particular, which argues in favour of a targeted increase in capital requirements for foreign participations. At the same time, this could also mitigate the impact of any ring-fencing measures[94] imposed by foreign authorities on the parent bank's capital.

- Increasing capital requirements for participations creates incentives for banks with complex structures to reduce internal interconnectedness and, if necessary, to adjust the group structure. Such adjustments further increase the likelihood of a restructuring being successful. This achieves the effect that the TBTF regime was aiming for, especially with a targeted increase regarding foreign participations. In a crisis, their recoverability must be questioned due to the high likelihood of ring-fencing or even a wind-down by local supervisory authorities. If these participations are considered to be worthless in a crisis, the parent bank must be able to bear losses in the amount of these participations. Otherwise, in the event of the parent bank becoming insolvent (e.g. if the emergency plan were triggered), its customers and creditors would suffer high losses in the bankruptcy proceedings, while those of the subsidiaries would be better off. They must therefore be deducted from eligible capital or the risk weighting for foreign participations will need to be increased appropriately.

- As explained in sections 7.2.3.1 and 7.3.2.2, this can lead to an overshooting at financial group level with regard to the requirements under a purely consolidated group view (see also Box 3). In the past, discounts were therefore applied so that Swiss G-SIBs did not have to hold significantly more capital at group level than other G-SIBs. Given the experience of the Credit Suisse crisis, this trade-off must be reassessed.

- The measure would have to be introduced for all SIBs. However, by focusing on foreign participations, it effectively targets SIBs with high exposures abroad, i.e. parent banks of G-SIBs. From a competition perspective, however, the restriction on SIBs has the disadvantage of introducing unequal treatment of those SIBs and non-systemically important banks which have high exposures abroad.

Full capital backing can be achieved by deducting (foreign) participations from the regulatory capital or by increasing the risk weighting of such participations accordingly. With the latter variant, the increase can be selected gradually. Calibrating the risk weighting so that it leads to participations being backed 100% constitutes a measure of similar strength as changing to a system of full deduction. In this case, a detailed examination needs be carried out to ascertain which system has the greater advantages.

Switzerland is also advocating the creation of more transparency regarding parent banks' capitalisation at international level.

[94] Ring-fencing occurs when foreign supervisory authorities (e.g. due to a lack of confidence in the stability of the bank) impose higher regulatory requirements on legal entities of G-SIBs domiciled in their country or restrict the transferability of capital and liquidity

7.5.2 Include forward-looking elements in institution-specific Pillar 2 capital surcharges

Another possible measure is to explicitly state in the legal basis that FINMA is authorised to systematically define institution-specific Pillar 2 capital surcharges that contain forward-looking elements. In this new system, FINMA would, on the basis of stress tests and ongoing monitoring, regularly review whether the capital requirements for SIBs in accordance with the CAO are sufficient or whether additional requirements are necessary in the form of institution-specific Pillar 2 capital surcharges. For this, FINMA would take into account, for example:

- company-specific factors such as the business model, corporate governance, complexity and resolvability;
- aspects such as profitability, stress tests, strategic plans and current and future risk profile (including weaknesses or deficiencies in risk management);
- market-based indicators such as market capitalisation, CDS premia and ratings.

This measure has several obvious advantages. It introduces a forward-looking element into the capital adequacy system, and should increase legal certainty with regard to implementation by FINMA. It is bank-specific, can be implemented in a risk-oriented and proportionate manner, and is embedded in the international regulatory and supervisory framework.

Publication of the results is an important feature of the forward-looking stress tests that still needs to be explored in greater depth. While publication generally has a disciplinary effect, the publication of negative results can end up intensifying a crisis. In the particularly sensitive area of liquidity, it was with this consideration in mind that the need to publish the surcharges for individual banks was waived when the TBTF requirements were introduced.

7.5.3 Blanket increase of the basic requirement (LR and/or RWA ratio)

Another possible measure is a general, significant increase in capital requirements. Significantly increasing the LR requirement for G-SIBs has also been suggested in parliamentary motions[95] amongst other things. An alternative is to increase the risk-weighted base requirement (minimum capital and capital buffer).

As well as measuring the risk-weighted capital requirements, the leverage ratio is designed as a simple measure to limit debt (backstop). However, it is not intended as a fundamentally binding measure, as it does not take detailed account of the bank's risk exposure. A massive increase in LR requirements alone would undermine the existing system. It would therefore have to be combined with a significant increase in risk-weighted capital requirements.

The advantage of this measure would be that any increase in capital requirements for SIBs would fundamentally strengthen their resilience. Any losses can be better absorbed, which reduces the likelihood of failure for a SIB. This in turn reduces the likelihood of a financial crisis (co-)caused by a Swiss SIB, which would jeopardise financial market stability and have potentially serious consequences for the economy.

At the same time, it must be remembered that Swiss SIBs are in competition with foreign and domestic banks, depending on the business area. As capital requirements are also associated with costs for the bank, attention must also be paid to proportionality when structuring the requirements. It is difficult to reach a final judgement on the exact impact of increased capital requirements.

In principle, the costs incurred by the banks concerned and their customers are offset by the benefits of greater financial stability. In their expert opinion,[96] Ammann et al. consider a moderate but substantial increase of the requirements to be a targeted, easily understandable and transparent solution, due to the predominantly positive effects on financial stability. On the other hand, the Expert Group on Banking Stability did not see a need to increase requirements.

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[95] For example, Motion 21.3910

[96] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, p. 46

One argument against a blanket increase in the capital requirement is that it strengthens the TBTF regime in a less targeted manner than other possible measures to increase capital. A massive increase in capital requirements would have to include other bank categories in addition to SIBs, owing to the impact on competition and proportionality. However, the capital requirements for the Swiss banking sector as a whole are already being fundamentally revised and made more risk-sensitive, due to the implementation of Final Basel III. With this in mind, the Swiss going it alone with a further general revision of the capital requirements for all banks is not an option.[97]

7.5.4 Increase the capital requirements via a tightened progressive component

As another measure, the progressive surcharges for the size and market share of a SIB can be increased in relation to both the RWA ratio and the LR (Art. 129 para. 2 and Annex 9 CAO). For SIBS and especially G-SIBs, the increase in the progressive component – without further adjustments to the applicable regulations – affects both the requirements of the financial group and the requirements for each group entity in Switzerland.

By increasing the progression, incentives can be created to ensure that SIBs and especially G-SIBs tend not to over-expand or, if they do, have to hold a disproportionate amount of capital. As such, the risks to the Swiss economy can be reduced, making the measure more targeted than a massive blanket increase in capital.

However, it should be noted that the progressive surcharges already have a significant impact on capital requirements. Overall, the contribution of this measure towards strengthening the TBTF regime appears less urgent and less targeted when compared to increased capital backing for parent-bank participations.

Higher progressive surcharges also have an impact on competition in Switzerland. SIBs and, in particular, Swiss subsidiaries of G-SIBs are also subject to higher percentage requirements than other banks in the domestic market. The fact that the Swiss subsidiary of a G-SIB is subject to higher requirements than a non-internationally active SIB or other domestically focused banks can be justified, but if the progressive surcharges are tightened further, the differences may no longer be justifiable.

7.5.5 Simpler, more intuitive capital structure

Risk-weighted capital requirements can be generally simplified, as another measure. Having only two components is conceivable: a minimum requirement (e.g. 10% CET1 ratio) and a single buffer (at least 3% of RWA in the form of CET1). It should be ensured that the quantitative requirements do not fall compared to today.

One advantage of this measure is the easy traceability and verifiability of compliance with these requirements, as well as a transparent representation of the loss-absorption capacity. One disadvantage, however, is that the progressive component would be removed, so would no longer incentivise a SIB against tending to over-expand, or otherwise having to hold a disproportionate amount of capital. Another disadvantage is the deviation from international standards, which makes comparing the requirements more difficult. The measure does not constitute a targeted strengthening of the TBTF regime. There is also the question of a suitable proportional implementation for SIBs in relation to the other banks.

7.5.6 Prudent valuation and recoverability of balance sheet items

The quality and transparency of regulatory capital can be improved through stricter rules on prudent valuation adjustments (PVA). The regulatory treatment of assets that are not sufficiently recoverable in a crisis, such as software, deferred tax assets and also hidden losses on held-to-maturity assets, can be tightened.

For this measure, it must be examined whether the BCBS's requirements on prudent valuation[98] are being implemented with sufficient caution by the Swiss banks or whether more stringent rules are needed in Swiss regulation in this regard, as is the case in the EU, for example.

This measure contributes to transparency and thus to market confidence in the capital adequacy of banks, and SIBs in particular. Another advantage is the reduction of negative surprises due to revaluations during crises. In addition to this, capital is also being increased in specific areas for banks, such as Credit Suisse, that aggressively push the leeway on valuations to the limit.

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[97] Expert group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023. p. 82

[98] BIS, Basel Framework, Prudent valuation guidance, CAP 50

7.5.7 AT1 instruments

7.5.7.1 Strengthen the risk-bearing function in the going concern

The aim of this measure is to ensure that AT1 instruments perform a risk-absorbing function in the going concern as provided for in the international standard, and more successfully than is being achieved today.

At international level, one way to achieve this is by adapting collective supervisory practices. If the substitution of AT1 instruments by the issuer is generally only permitted in exceptional cases and no longer as a rule, then market expectations will also adjust where necessary. Then, even in a crisis, it will be easier to avoid the costly renewal of these bonds without sending out an exceptional signal of weakness.

Also, the conditions under which bonds are eligible as AT1 capital can be further defined and tightened in the regulatory requirements in future. It would be possible to guarantee improved loss-absorbing capacity in the going concern or in a stabilisation phase for example, by:

- prohibiting coupon payments and buy-backs after sustained losses, according to clear criteria (e.g. two quarters in succession); or
- increasing the trigger, for example, to a CET1 ratio of at least 10%.

These considerations should also be taken into account at international level, since such an adjustment should ideally be implemented globally. The BCBS also plans to strengthen the risk-bearing function of AT1 instruments as a key measure.[99]

7.5.7.2 Only allow convertible instruments

A criticism sometimes voiced is that under the current legal framework and under certain conditions, the creditor hierarchy expected in most other circumstances does not apply to write-off AT1 instruments. To mitigate this, the regulatory requirements could be amended so that only conversion instruments are allowed, and write-off AT1 instruments are no longer accepted. Alternatively, FINMA's practice could simply be adjusted.

This measure does not strengthen the risk-bearing function of AT1 instruments, however. It therefore does not make a decisive contribution to strengthening the TBTF regime. Various implementation issues also need to be taken into account, particularly in the case of state-owned banks. Such a measure also means Switzerland forging its own path away from the BCBS standard.

7.5.7.3 Replace AT1 requirements with corresponding CET1 requirements

This measure aims to increase the quality of the capital required to meet the going concern requirements while maintaining the level and structure of the existing capital requirements. Specifically, this measure requires that the going-concern requirements only be met with CET1; AT1 instruments would no longer be recognised.

One advantage of this measure is that it simplifies the requirements and increases their transparency. The criticisms levelled at the loss-absorbing capacity of AT1 instruments in the going concern would naturally no longer apply if these instruments were eliminated. The higher quality of the capital would also increase the confidence of lenders (including depositors) in the bank. With regard to the cost of equity capital in relation to debt capital, the expert opinion by Ammann et al. argues that the differences are negligible.[100]

An adjustment such as this would involve Switzerland fundamentally deviating from the international standard and the practice in other jurisdictions, however. This would impact the entire banking sector. This would make it more difficult to compare capital ratios, and internationally active banks, in particular, would find themselves without a level playing field in terms of competition.

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[99] BCBS, Report on the 2023 banking turmoil, October 2023

[100] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 42

7.5.8 Continue the previous tax treatment of equity and debt capital

7.5.8.1 Excursus: Tax treatment of equity capital and debt capital

Companies can cover their financing requirements with new equity from outside (equity financing), from retained earnings from within (self-financing) or with borrowed capital (debt financing).

How these alternative financing methods are taxed depends on the type of investor. For both foreign investors and those domestic investors (such as institutional investors) who are not liable to tax at household level, only the tax burden at company level is relevant. For domestic natural persons, on the other hand, it is not just the upfront tax burden at company level that plays a role, but also the tax burden at household level.

Table 4 below shows the taxes levied on alternative financing methods at company and household level.

	Financing with equity capital		**Financing with debt capital (debt financing)**
	Equity financing	**Self-financing**	
Company level	Profit tax	Profit tax	
	Capital tax	Capital tax	
	Issue tax on equity capital		
	Withholding tax on dividends		Withholding tax on interest
Household level	Income tax on profits distributed	Capital gains tax (generally tax free in Switzerland)	Income tax on interest
	Wealth tax	Wealth tax	Wealth tax

Table 4: Taxes at company and household level

Source: FTA

At *company level*, debt financing remains untaxed, as interest on debt capital can be deducted as an expense from the profit tax assessment basis. However, if the financing is provided by means of equity, the assessment basis for profit tax is not reduced, meaning that equity financing is subject to profit tax on any profits earned. Capital tax increases this burden even further. The issue tax on equity is only levied on equity capital injected from outside and therefore only affects equity financing, while self-financing remains unaffected by this tax.

At company level, the picture that emerges is that equity financing is the most expensive financing method, followed by self-financing, whereas debt financing is largely untaxed, or even attracts relief.

Withholding tax burdens domestic investors solely through the impact on interest between the time of collection and the time of full reimbursement. Equity financing is affected by withholding tax on dividends, and debt financing by the withholding tax on interest. For foreign investors, the withholding tax burden depends on the double taxation agreement (DTA) with the partner country. In the absence of a DTA, withholding tax is charged in full (35%). Switzerland endeavours to achieve zero taxation on interest with DTAs, meaning that the withholding tax can be fully reclaimed under many DTAs and no residual tax remains. In the case of direct investments, no residual tax is typically levied on dividends either (with the notable exception of the USA, with a residual tax of 5%). In contrast, the residual tax on dividends from portfolio investments in a typical DTA is 15%.

At *household level,* the wealth tax essentially places the same burden on all financing methods. Interest on borrowed capital is recognised in full for income tax, meaning that income tax is charged in full on debt financing. This also applies to equity financing, provided the investor

does not benefit from partial taxation of distributed profits. Taxes are also incurred at household level when self-financing, as the retention of profits increases the value of the company. Capital gains generally remain tax-free in Switzerland, so that self-financing at household level is typically only subject to wealth tax on the sale of equities.

In terms of the cumulative tax burden at company and household level, self-financing proves to be the most favourable form of financing, due to the tax exemption of capital gains. For investors who benefit from partial taxation of distributed profits (because they hold at least 10% of the equity), the second most favourable form of financing is usually equity financing. The order of preference is reversed for investors who do have partial taxation, because debt financing is usually more favourable than equity financing, owing to the upfront profit tax burden and the unmitigated taxation of dividends.

Table 5 summarises which financing method is preferable for which type of investor, based on the tax burden. The most favourable financing method is ranked first, the least favourable third.

Type of investor	Foreign investors; domestic institutional investors	Domestic qualifying natural persons	Domestic non-qualifying natural persons
Attractiveness	1. Debt financing 2. Self-financing 3. Equity financing	1. Self-financing 2. Equity financing* 3. Debt financing*	1. Self-financing 2. Debt financing 3. Equity financing

* Trend observation; does not necessarily apply to every canton.

Table 5: Attractiveness of financing methods, broken down by investor type — Source: FTA

7.5.8.2 Continue the current exemption from withholding tax

Income from TBTF instruments (e.g. bail-in or write-off bonds) is currently exempt from withholding tax. SIBs have to issue TBTF instruments from an entity domiciled in Switzerland in accordance with regulatory requirements. Due to the funds required in comparison to the size of the local financial centre, it is by no means possible to place all funds with domestic investors. The exemption from withholding tax is intended to ensure that banks can issue TBTF instruments outside Switzerland at competitive terms. This is crucial, as insufficient ability to raise funds can have a negative impact on financial stability.

To date, the exemption has been granted by Parliament for a limited period (the current period expires in 2026), as a fundamental reform of the withholding tax was assumed. The economic policy objective of this reform was to strengthen the debt capital market. All investors were to be exempt from withholding tax on bonds. The entry into force of that reform would have rendered obsolete any further extension of the period of validity of the withholding tax exemptions on interest from TBTF instruments, as competitive framework conditions would have been created for all bonds, including TBTF instruments. However, in the popular vote of 25 September 2022, voters rejected the corresponding amendment [101] to the Federal Withholding Tax Act of 13 October 1965.

An indefinite extension of the exemption is therefore necessary to prevent negative effects on financial stability. As such, extending the privileged treatment compared to other corporate bonds is in the public interest and is therefore in line with the Constitution.

In order to prevent a gap arising between 1 January 2027 and the entry into force of the legislative proposal as part of the proposed measures in this report, an interim extension of the exemption is also necessary

[101] BBl **2021** 3002

7.5.9 Conclusion and proposed mix of measures for capital requirements

The first question to arise is whether there is any need for action at all based on the assessment or new findings on the TBTF regime in the area of capital requirements. It is the Federal Council's view that the response to this question is "yes", for several reasons. Even though many elements have proven their worth and – at least at first glance – capitalisation was not at the centre of the Credit Suisse crisis, both the initial situation has changed and new findings have emerged.

A sensible mix of measures should make an effective contribution to crisis prevention and – not least for competitive reasons – be appropriately embedded in the international context. In the mix of measures for capital requirements, there is also a conflict of objectives between the criteria of a good cost-benefit ratio on the one hand, and general validity, i.e. effectiveness in various (crisis) scenarios and bank structures, on the other. While a blanket increase in capital requirements through an adjustment of the LR requirements or via the risk-weighted requirements will generally increase the resilience of all banks, there is a risk that the contribution to the strengthening of the TBTF regime will be less precise and not very efficient. Preference should therefore be given to measures that are aimed at strengthening the capital requirements of SIBs and increasing their transparency, and which provide clarity and room for manoeuvre in a crisis, even in the case of complex bank structures.

The Credit Suisse crisis has made it clear that a SIB can meet the capital requirements and yet still face insolvency. One of the reasons for this is that the capital requirements are not forward-looking. The mix of measures therefore needs to introduce a forward-looking element that takes various factors into account and is thematically broad-based.

This measure is embedded in the international framework and can be implemented in a very risk-orientated and institution-specific manner, which seems sensible given the heterogeneous conditions of Swiss SIBs. Institution-specific capital surcharges (Pillar 2 surcharges) for SIBs must be determined based on stress tests. By publishing the respective stress scenarios and results, this instrument can also increase transparency regarding the capitalisation of the banks concerned. This stress test must be enshrined in law.

The assessment has shown that the parent banks in particular do not have sufficient capital to enable the bank to implement effective mitigation measures (e.g. the sale of business units, especially those abroad) in a crisis. Moreover, the parent bank's capitalisation represents a weakness in the TBTF regime in general, and in a resolution scenario in particular. Thus, the most effective and targeted measure for strengthening parent bank capitalisation is a significant increase in the risk weightings for foreign participations within a financial group or, alternatively, the deduction of such participations. This also incentivises the reduction of intragroup interconnectedness and increases the likelihood of a successful restructuring.

This measure is a central element of the mix of measures and, if strictly implemented, will lead to a substantial increase in capital, particularly at G-SIB group level. To date, this measure has not been strictly implemented in the TBTF regime because of its potentially high impact. However, in the new situation, with one remaining G-SIB which is now even larger relative to GDP, greater capitalisation (possibly above average in an international comparison), is desirable and also represents a signal of strength in global asset management.

Furthermore, as a sensible and targeted measure. the treatment of assets which have little value in a crisis should be examined and tightened. This enhances the quality of capital backing, particularly in crises.

The measures outlined above will lead to a significant increase in capital for the SIBs and in particular for the one remaining G-SIB. It should be noted that requirements are already increasing significantly for UBS due to the existing progressive surcharges. Furthermore, the implementation of Final Basel III and the discontinuation of certain exemptions (regulatory filters) that were granted to Credit Suisse will lead to higher requirements for UBS and therefore an increase in capital.

The other quantitative measures examined, such as a general increase in the leverage ratio requirements or higher progressive surcharges, should be avoided, for reasons of proportionality, difficulties embedding them in the international framework, economic feasibility and their less targeted effect.

Ultimately, the assessment raises the question of possible measures for AT1 instruments. In line with international efforts, the risk-bearing function in the going concern must be strengthened first and foremost, for example by prohibiting coupon payments and buy-backs following sustained losses, or by raising the trigger.

In addition, the exemption of TBTF instruments from withholding tax, which will expire at the end of 2026, should be extended in order to ensure the continued competitiveness of Swiss issuance (see section 7.5.8.2).

8 Liquidity requirements

8.1 Introduction

In addition to an adequate level of capital and additional loss-absorbing funds, ensuring the stability of a SIB requires a sufficient level, and robust sources, of liquidity.

Banks exercise an economically important function through what is called maturity transformation. For instance, they provide long-term loans for households and companies, thereby investing in comparatively illiquid assets. At the same time, banks accept sight deposits from customers, which can be withdrawn at short notice. If an unexpectedly large number of depositors withdraw their sight deposits totalling a significant amount, this can cause difficulty for a bank that is solvent in principle because its assets, for example in the form of loans granted, are committed over the long term and are therefore unavailable at short notice to fund deposit withdrawals. A bank is therefore vulnerable to liquidity risk because in the event of a crisis, it would be forced to sell its illiquid assets at a significant loss.

This issue is addressed in the applicable liquidity regulation through two lines of defence:

Liquidity requirements (first line of defence): SIBs, like all banks, must cover their liquidity needs in the first line of defence through their own liquid assets and through sources of liquidity on the market. In compliance with the minimum requirements enshrined in the LiqO, they must therefore have sufficient liquidity available to satisfy payment obligations during periods of stress. With effect from 1 January 2024, SIBs must hold legally regulated additional liquidity buffers compared to other banks (TBTF liquidity requirements). Thus, as part of the first line of defence, the strengthening of the bank's own liquidity holdings, has already been implemented for SIBs.

Lender of last resort (second line of defence): Even with the TBTF liquidity requirements mentioned, situations in which a bank's own liquid assets are insufficient to cover liquidity needs are conceivable. In the second line of defence, the SNB can provide further liquidity under certain conditions via emergency liquidity assistance (ELA). However, emergency liquidity assistance is only available against sufficient collateral (see Art. 5 para. 2 let. e in conjunction with Art. 9 para. 1 let. e of the National Bank Act of 3 October 2003,[102] NBA), whereby the term "sufficient" is not further specified in the legislation in force. It is for the SNB to define the meaning of "sufficient".

PLB (third line of defence): With the bill of 6 September 2023,[103] a third line of defence should be available to SIBs in future, in the form of the PLB. This is necessary because despite the first two lines of defence, it cannot be ruled out that liquidity outflows from a bank which is solvent in principle will be on a scale exceeding the available collateral. In particular, the additional volatility generated by the fast pace of digital information transfer and digital banking creates new challenges here. This could put a SIB at risk of failure due to liquidity problems – even if it meets the regulatory capital requirements and is solvent.

The PLB aims to increase the confidence of market participants in the successful continuation of the SIB ex ante. It can also provide the required liquidity temporarily and under certain circumstances, to enable restructuring or liquidation while continuing the systemically important functions.

These three lines of defence will be discussed separately below. First, liquidity requirements are covered in greater depth. The subsequent chapters contain a discussion of the design of the LoLR and the PLB.

8.2 Background

In Switzerland one lesson drawn from the 2007–08 financial crisis was to systematically adjust the liquidity requirements for all banks and additionally introduce special liquidity requirements for SIBs. The revised liquidity regime came into effect on 1 January 2013.Thus, Switzerland responded to the financial crisis within a short time, by amending the 1988 liquidity requirements and introducing stricter requirements which better reflected the risks. This was done without waiting for international developments, and ultimately resulted in the BCBS's liquidity coverage ratio (LCR) entering into force for all banks on 1 January 2015.

In addition to the requirements applicable for all banks, the liquidity regime introduced for SIBs in 2013 was replaced by a new regulatory concept that came into force on 1 July 2022.

[102] SR **951.11**
[103] BBl **2023** 2165

The liquidity requirements for SIBs are set out below. Subsequent sections discuss the liquidity requirements applicable to the SIBs and to all banks (LCR, NSFR).

8.2.1 Requirements for SIBs valid from 2013 to 2022

The core element of the liquidity regime introduced for SIBs in 2013 in the LiqO was a stress scenario comprising a general crisis on the financial markets coupled with a loss of creditor confidence with regard to the bank. The corresponding liquidity requirements stipulated that each SIB must be in a position to cover the estimated outflows in this scenario for a period of 7 days and 30 days. To this end, they were required in particular to hold an adequate reserve of HQLA. Conceptually, the regime therefore anticipated many aspects of the LCR later introduced for all banks. However, it assumed a generally more conservative scenario and the liquidity buffer was more broadly defined.

Article 52 BankA provides for a periodic review of the provisions for SIBs. In the evaluation report of 3 July 2019,[104] the Federal Council mandated the FDF to undertake an in-depth assessment of the liquidity requirements for SIBs. The assessment was prepared in collaboration with FINMA and the SNB, and found that the special liquidity requirements for SIBs enshrined in the LiqO since 2013 were insufficient. They did not result in a consistently higher level of liquidity compared to the requirement applicable to all banks of an LCR of 100%. The higher level of resilience of SIBs to liquidity shocks required in the Banking Act was therefore not guaranteed. In particular, the liquidity needs of a SIB in the event of restructuring or liquidation were not adequately covered.

Consequently, the LiqO was revised and the Federal Council put a new liquidity concept for SIBs with revised liquidity requirements into force on 1 July 2022. The institutions concerned have to comply fully with this concept by end-2024.[105] During the transitional period from July 2022 to December 2024, institutions must not fall below the liquidity requirements set by FINMA as part of its supervisory role. In accordance with Article 31c paragraph 3 LiqO, the effectiveness of the new provisions for SIBs must be reviewed by the end of 2026.

8.2.2 Revised requirements for SIBs in force since July 2022

The revised regulatory concept[106] for SIBs builds on the LCR applicable for all banks. In particular, SIBs must hold sufficient liquidity to weather a 90-day liquidity crisis (as opposed to 30 days). This assumes a 60-day additional scenario that adds on to the 30-day stress period of the LCR already enshrined in the regulations.

Beyond the 30-day stress period of the LCR, the revised regulation includes basic and institution-specific additional requirements for SIBs.

The basic requirements cover risks that are given too little consideration in the regulations applicable for all banks. On the one hand, lower inflows – i.e. an extension – of maturing loans are assumed.[107] On the other, SIBs must hold sufficient eligible assets to cover liquidity needs based on risks from an accumulation of outflows immediately from calendar day 31 (cliff risk) and a stress scenario with a 90-day horizon.

The 60-day scenario is based on the assumption that the situation of the bank concerned will gradually recover after FINMA determines impending insolvency (PONV) on the 30th day of the stress scenario and subsequent measures by FINMA. The liquidity requirements therefore assume that the SIB concerned successfully withstands the crisis and is able to continue its activities despite a potentially reduced or restructured business model. In the 60-day scenario, this is reflected by decreasing net cash outflows from day 31 to day 90.

The requirements from the 90-day horizon can be covered beyond the high-quality liquid assets (HQLA in accordance with Art. 15 LiqO) recognised in the LCR with

[104] BBl **2019** 5385

[105] The concept contains basic requirements and institution-specific additional requirements (see subsequent section). The basic requirements must be met with effect from 1 January 2024. In the event of a need to expand liquidity, a transition period applies for the institution-specific requirements, with phase-in until 31 December 2024. The more stringent individual requirements set by FINMA continue to apply until then, unless they are exceeded by the basic requirements

[106] The new requirements for SIBs in the LiqO entered into force on 1 July 2022 but only needed to be met from 1 January 2024 (AS 2022 359). See Federal Council press release, Systemically important banks: Federal Council adopts amendments to Liquidity Ordinance, 3 June 2022

[107] This is because it can be assumed that the bank does not want to lose customers and will thus continue to maintain its loan and mortgage portfolios in full, in spite of the crisis. In addition, a bank cannot significantly reduce loan volumes over a short period without a negative impact on the real economy

other less liquid securities and/or securities that are not under the control of central liquidity management. However, increased haircuts are defined for these assets in the LiqO.

In addition to the increased basic requirements, FINMA can also specify institution-specific surcharges. A non-exhaustive list of the situations to be covered here can be found in Article 25 LiqO. They include in particular risks arising from the following situations:

- Intraday liquidity needs;
- Initial margins;
- Margin requirements for OTC securities financing tranactions settled via central counterparties;
- Debt buy-back;
- Substantial financing of a group company by subsidiaries;
- Non-risk-proportionate liquidity distribution within the financial group;
- Liquidity needs for a possible restructuring or liquidation;
- Insufficient risk management with regard to liquidity.

When defining the requirements, FINMA takes into account aspects including the banks' assessments of the individual situations. Banks can propose to FINMA that other liquidity-generating measures through which the bank can obtain liquidity in a crisis are taken into account to cover the surcharges. The total of these "discounts" may not be higher than the total of the surcharges.

To achieve the objective of a liquidity buffer, the new TBTF liquidity requirements do not always have to be met in full on a daily basis. Instead, a rolling average is considered. Specifically, the daily average of the liquidity needed under the requirements of the moving three-month period ending with the reference date must be covered at all times with the daily average of eligible assets for this period.

This should enable better smoothing of daily and/or short-term fluctuations. However, the liquidity requirements must be covered to at least 80% with eligible assets on a daily basis. The need to disclose the additional TBTF requirements has also been waived to facilitate availability of the buffer in a liquidity crisis.[108]

The revised basic requirements must be met with effect from 1 January 2024. In the event of a need to expand liquidity, a transitional period applies until 31 December 2024 for the institution-specific additional requirements. The increased individual requirements set by FINMA continue to apply until then, unless they are exceeded by the basic requirements. FINMA's increased requirements were introduced as a temporary solution to strengthen the liquidity of SIBs and ensure, among other things, that there will not be a reduction in HQLA holdings during the transition period between the old and new liquidity regimes. In accordance with Article 31c paragraph 3 LiqO, the effectiveness of the new provisions for SIBs must be reviewed by the end of 2026.

8.3 International comparison

The Swiss liquidity regulations for SIBs are strict. None of the leading international jurisdictions such as the UK, the USA and the EU have regulatory basic requirements from the 30th calendar day of a liquidity stress scenario. In particular, in the UK and the EU, the focus is on modelling capabilities to estimate liquidity needs, and not building up a buffer ex ante. In the event that the need in the restructuring or liquidation phase exceeds the banks' available liquidity, public liquidity backstops are available in these jurisdictions.

In the UK, there are various Pillar 2 surcharges for risks that are not covered by the LCR. This component is comparable with the institution-specific surcharges under the Swiss regulation. The Prudential Regulation Authority (PRA) also takes into account a 90-day stress scenario.[109] As in Switzerland, the level of the surcharges is not made public.

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[108] FDF, Erläuterungen zur Änderung der Liquiditätsverordnung, 3 June 2022, p. 7

[109] Bank of England Prudential Regulation Authority, Statement of Policy on Pillar 2 liquidity, June 2019

In the USA, the liquidity requirements for the US Title I Resolution Plan stipulate, among other things, that the liquidity needs of all operational entities be modelled over a resolution period of at least 60 days after bankruptcy or official resolution measures, and that an adequate liquidity buffer be held.[110]

In the EU, the extended time horizon of the stress scenario applied by the European Central Bank (ECB) is 180 days.[111] Like the UK, the EU has no fixed regulatory liquidity requirements for the restructuring or liquidation phase. The authorities determine any additional requirements as part of the supervisory process.

If the HQLA held as at the end of 2022 by international banks that are comparable with Swiss G-SIBs are compared to total exposure,[112] it can be ascertained that the ratios of Credit Suisse and UBS were comparable with those of foreign G-SIBs (see Table 6: International comparison of ratio of HQLA to total exposure (reference date: 31 December 2022)). However, at this point in time, the new requirements for SIBs in the LiqO were not yet applicable in Switzerland.

Following the stress of the preceding October, as at the end of 2022 Credit Suisse's ratio of HQLA[113] to total exposure was comparable to that of Morgan Stanley and Deutsche Bank. Only Barclays was at the same level as UBS, with a ratio of 23%. At 27%, Credit Suisse's ratio before the October outflows was significantly above the figures for the comparator banks as at the end of 2022.

CHF bn.	CS Group	UBS	Deutsche Bank[2]	Barclays[3,4]	Morgan Stanley[5]
HQLA	120	223	217	360	223
TE[1]	651	959	1233	1576	1305
HQLA : TE	18 %	23 %	18 %	23 %	17 %

[1] Total leverage ratio exposure
[2] Exchange rate: EUR/CHF 0.99384
[3] Exchange rate: GBP/CHF 1.12373
[4] For comparison purposes, the banks' deposits at the central bank usuallyexcluded from total LR exposure in the UK have been included.
[5] Exchange rate: USD/CHF 0.93253

Source: FINMA.

Table 6: International comparison of ratio of HQLA to total exposure (reference date: 31 December 2022)

[110] The resolution liquidity execution need (RLEN) comprises the minimum operating liquidity and the peak funding need. The RLEN must be recalculated daily for each day of the resolution period. As soon as the RLEN is no longer covered by the available liquidity resources, management must take the necessary measures at holding company level. Accordingly, the RLEN also has a management buffer. The US Intermediate Holding Companies (IHCs) of foreign banks are also subject to the obligation to calculate the RLEN, see Federal Reserve System, Guidance for Resolution Plan Submissions of Certain Foreign-Based Covered Companies, 9 December 2020

[111] ECB Banking Supervision, Methodological note on ECB Sensitivity Analysis of Liquidity Risk – Stress Test 2019, February 2019

[112] The total exposure corresponds to the denominator in the leverage ratio and comprises the total of on- and off-balance-sheet positions

[113] In Switzerland's case, the HQLA are based on the weighted daily three-month average

8.4 Assessment

8.4.1 Positive effects during the crisis

8.4.1.1 Higher liquidity compared to 2007-08

Credit Suisse had a substantially higher level of liquidity than during the 2007-08 financial crisis. This higher level was attributable among other things to FINMA's bank-specific liquidity requirements, which were geared towards addressing the increased liquidity risk specific to the bank.

In the third quarter of 2022, the LCR of Credit Suisse at group level was 192%. This corresponded to HQLA holdings of CHF 227 billion, and accounted for 32% of the total assets of CHF 700 billion. With this sound level of liquidity, Credit Suisse was able to absorb the first extraordinary wave of outflows in October 2022. The LCR remained at a high level from a group perspective, including in comparison to foreign competitors.

As at the end of December 2022, the LCR was 140%. This corresponded to HQLA holdings of CHF 120 billion, which accounted for more than 20% of the total assets of CHF 531 billion.

It is difficult to make a direct historical comparison with the liquidity situation of Credit Suisse in 2007 as there was no analogous definition of HQLA at that time. However, a rough comparison can be made as follows: According to the annual report, with total assets of CHF 1,360 billion, in addition to cash of CHF 38 billion, liquid assets accepted by central banks of CHF 60 billion were available in 2007.[114] This meant that total liquid funds accounted for 7% of total assets. In the 2007 annual report, this led Credit Suisse to state that the level of liquid funds was "well beyond regulatory requirements".

Overall, it is apparent that from a liquidity perspective, the resilience of Credit Suisse in 2022 prior to the first deposit withdrawals was significantly higher than in 2007, in part thanks to the additional FINMA measures, with liquid asset holdings more than four times higher.

A higher level of liquidity results in greater financial market stability from an economic perspective. Investor confidence in Switzerland as a business location therefore increases and contributes to added value and job creation thanks to the positive impact on the inflow of capital and knowledge.

8.4.1.2 Realistic scenarios in TBTF liquidity requirements

The TBTF components already in the regulatory provisions of LiqO covered the significant risks that arose at Credit Suisse. For example, it became clear that a liquidity crisis may last for far longer than 30 days or that intraday liquidity needs may be subject to significant fluctuations. The increased margin requirement in particular was also evident during the COVID crisis. The fact that the new liquidity requirements permit institution-specific surcharges enables FINMA to apply lessons from the current crisis to the calibration of these requirements.

8.4.1.3 More stringen reporting obligations

Timely information as regards both HQLA holdings and possible outflows is essential for FINMA to adequately assess a bank's liquidity situation. Article 28 LiqO specifies that SIBs must report their liquidity situation monthly and must submit details of this within 15 calendar days from the last calendar day of the month. In addition, Article 17*b* paragraph 5 LiqO stipulates that FINMA may impose intra-month LCR reporting with short reporting deadlines for banks that fall short of the required compliance level. FINMA can impose additional liquidity reporting which is appropriate to the duration and magnitude of the LCR shortfall. To ensure that the liquidity buffer built up can be used in the event of a crisis, according to Article 26 LiqO, falling short of the special TBTF liquidity requirements is permissible for SIBs in exceptional circumstances.

The possibility of increasing the reporting frequency means that in principle, banks must permanently maintain systems that enable the prompt obtention of information. In the case of G-SIBs, information updated daily must be available at all times with a minimal time lag and must also be interpretable by foreign regulators. To this end, FINMA together with key foreign supervisory authorities

[114] Credit Suisse Group AG, Annual report 2007, pp. 93 and 166

has drawn up uniform reporting (known as a liquidity crisis template) for G-SIBs which can be activated in a stress scenario – including even before falling short of the regulatory requirements. This reporting had already been introduced before the crisis at Credit Suisse, which proved to be extremely helpful.

8.4.1.4 Disclosure requirements for TBTF liquidity surcharges

It is essential that the liquidity buffers built up by banks in good times are available to manage a crisis without any stigma being attached to their use. This was also demonstrated in the Credit Suisse crisis. In the interests of the use of liquidity buffers in a crisis, it would therefore seem advisable to maintain the regulatory waiver of disclosing the requirements originating from the TBTF surcharges.

8.4.2 Lessons and need for action from the crisis

8.4.2.1 Increased liquidity holdings not sufficient

Credit Suisse's increased liquidity holdings were not enough to prevent the extensive loss of confidence and ultimately the threat of insolvency. Counterparties also reduced their limits while payment and clearing agents required extensive provision of liquidity.

Four findings are of particular relevance:

- First, the necessary liquidity needs under the current funding structures were higher than anticipated in the event of an acute loss of confidence.
- Second, the shortfall was not always in HQLA securities, but also in cash holdings and central bank reserves.
- Third, early action was not automatically triggered, as there are no thresholds in relation to the liquidity regulations below which an intervention is mandatory.
- Fourth, the preparation of emergency liquidity via sufficient collateral eligible for central bank refinancing was inadequate (see section 9.4.2).

Some of these findings have already been taken into account with the significantly stricter liquidity requirements for SIBs that must be fully complied with by December 2024.[115] Additionally, in light of the insights gained worldwide, a further review and, if necessary, strengthening of liquidity levels for banks is called for.[116] To ensure a level playing field, this should be done taking into account international regulatory efforts in this regard.

By contrast, the expert opinion by Ammann et al. concludes that it would be a mistake to further increase the liquidity requirements for SIBs.[117] It states that providing a bank with liquidity that would help it to withstand a bank run by depositors would be untenable from a business point of view and make no sense at the economic level because the opportunity costs for the bank would be too high and the ability to issue loans would be severely reduced. According to Ammann et al., an extreme need for liquidity should therefore be tackled with other resources or covered by a lender of last resort.[118]

8.4.2.2 Recourse to emergency liquidity and measures according to the contingency funding plan

With regard to emergency liquidity, the Credit Suisse crisis showed insufficient preparation of the collateral available for emergency liquidity from central banks or access to such liquidity by the bank (see also explanations regarding the lender of last resort). Preparation for the use of central bank facilities of the SNB and foreign central banks is a step which is not to be neglected.

Equally, liquidity-generating measures from the contingency funding plans were not enough to sufficiently restore the liquidity buffer following the large outflows in autumn 2022. Credit Suisse therefore lacked the possibility to generate liquidity because certain planned measures could not be implemented (attracting new deposits), only had a limited impact (issuing debt instruments), only proved successful after a delay or were only reluctantly pursued by the bank to protect the business franchise (reducing funding requirements, namely through the termination of loans granted and thus a reduction of assets in the balance sheet).

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[115] In accordance with Article 31c paragraph 3 LiqO, the effectiveness of the new provisions for SIBs must be reviewed by the end of 2026

[116] See also Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023, p. 41

[117] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 40. Criticisms of an increase in liquidity requirements are also found in the Group of Thirty (G30) report Bank Failures and Contagion: Lender of Last Resort, Liquidity, and Risk Management, 9 January 2024, p. 2

[118] See also Group of Thirty (G30), Bank Failures and Contagion: Lender of Last Resort, Liquidity, and Risk Management, 9 January 2024, p. 2

8.4.2.3 Availability and transferability of liquidity in the group

In the same way as capital, the focus of liquidity requirements in the case of Credit Suisse followed a central treasury approach with regard to the financial group. The most important entity was thus the parent bank, as this is where the liquidity was managed and distributed within the group. During the crisis, it was apparent that a large buffer was required and little collateral was available at parent-bank level. This critical situation was partly amplified by precautions taken by the bank in the form of an additional management buffer and by trapped liquidity. This also meant that at parent-bank level, the LCR in the idiosyncratic stress scenario was no longer allowed to fall below 100%.

Equally, in individual entities, a high level of liquidity was necessary for operational purposes; this was partly covered by intraday needs according to the internal bank model but was much higher in some cases due to the liquidity required for the foreign entities by the relevant regulators. Here, the assumption currently included in the Basel Framework and underlying the Swiss implementation, namely that only liquidity held under local requirements and exceeding the outflows resulting from the scenario should be excluded from the group LCR as trapped liquidity, must be questioned. When the stress does not affect all entities to the same extent, this means there is liquidity in individual entities that can be recognised in the group for regulatory purposes but is not available in the right location to cover outflows and also cannot be easily transferred within the group as necessary if required. In addition to local requirements, internal group limits may play a role here.

8.4.2.4 Use of liquidity buffer and stigma

With regard to the LCR falling below 100%, there was considerable stigma-related reticence. During the crisis, Credit Suisse believed that the LCR should not fall below 100% because this could have led to additional negative signals on the market (stigma).

As the LCR was basically developed as a buffer in the event of a crisis, it is problematic if the LCR cannot be allowed to fall below the requirement due to actual or perceived market expectations and, as a result, this buffer function does not come into effect.

8.4.2.5 Function of LCR and NSFR

Finally, it should be noted that, as with capital, the regulatory liquidity ratios and the high liquidity holdings did not manage to generate the necessary customer confidence as point-in-time considerations. Compliance with the liquidity requirements was unable to prevent or stop the bank run.

In particular, the NSFR did not serve here as an early warning indicator as intended, or as a ratio that could sufficiently prove stable funding. One reason for this may lie in particular in the focus on short-term capital market funding as a primary source of risk in the NSFR. While this form of funding is considered to be unstable in the NSFR, the risk of deposit withdrawals is not sufficiently reflected in this ratio due to excessive stability assumptions for customer deposits.

8.4.2.6 Insufficient outflow rates in the LCR

The rates of individual deposit outflows (in particular for large-volume deposits) are far lower in the LCR than those actually observed. In addition, a large proportion of customer deposits at Credit Suisse were sight deposits or were held as deposits subject to a short notice period, which accordingly enabled rapid withdrawal. While the new TBTF requirements make explicit provision for a number of risk drivers, including intraday needs or liquidity for restructuring or liquidation purposes, other aspects also led to an increased need for liquidity. In particular, it was noted that digitalisation via social media and new banking technologies may lead to an acceleration in withdrawal and herd behaviour, and may further destabilise an already distressed bank.

8.4.2.7 Foreign currency requirements not sufficiently taken into account

With regard to foreign currency requirements, the focus so far in the Swiss LCR has been on the aggregated overall view of all currencies and the view in Swiss francs. The LCR in other significant foreign currencies is not linked to an explicit level requirement.

The Credit Suisse crisis showed that, due to the increased need for liquidity in US dollars, the SNB repeatedly had to make US dollar liquidity available to the banks. This indicates that the proportion of liabilities in US dollars measured against a bank's total liabilities may have been substantial in the case of Credit Suisse, for example, and should have been monitored with a specific LCR floor in US dollars.

8.4.2.8 Provision of information

Uncertainties regarding data quality and delays in providing information are significant impediments to managing a crisis and must be prevented. In particular, the quality of certain specific data on crisis management that must be reported to the authorities in the course of daily liquidity reporting (e.g. on intraday deposit outflows or forecasts of the liquidity situation for the coming weeks) must be reliable (see section 12.1.2). Accordingly, the regulatory requirements in this area could be tightened.

8.5 Possible measures

The following sections discuss the range of possible measures in the area of liquidity. These are assessed taking into account their individual advantages and disadvantages. Due to their interdependencies, the measures are assessed as a whole together with the lender of last resort and public liquidity backstop measures discussed in subsequent chapters. Accordingly, section 10.4.2 presents conclusions on the three lines of defence in the area of liquidity, and proposes a specific mix of measures.

8.5.1 Review of liquidity requirements at international level

The implementation of the most recent revision of the LiqO already takes account of the essential need for action on special liquidity requirements for SIBs, resulting in significantly tightened and, when compared internationally, high liquidity requirements for SIBs. For liquidity risks that are not covered, or not adequately covered, by the LCR or the basic requirements, the revised LiqO gives FINMA the option to impose institution-specific surcharges for SIBs. In accordance with Article 31c paragraph 3 LiqO, the effectiveness of the new provisions for SIBs must be reviewed by the end of 2026.

A review and further strengthening of the liquidity requirements relating to the LCR and NSFR applicable for all banks should be addressed at international level. As measurement ratios for all banks, the LCR and NSFR are part of the international liquidity regulation standard. Consistent calculation of these ratios is important for international comparability and similar conditions, to create a level playing field as regards competition. If, in a specific crisis event, the level of a bank's LCR and NSFR falls below the internationally applicable minimum of 100%, markets are quick to react negatively. In the market's rush to make decisions, evaluating the strictness of nationally set factors that have to be met in order to comply with the minimum level is not the market's primary focus. Strict national requirements can thus result in unfair competitive conditions for banks.

Options for action in connection with the LCR and NSFR should therefore be addressed as part of an internationally coordinated revision of international standards. The BCBS also considers a review of the design and operationalisation of the international standards' liquidity requirements following the events of March 2023 to be advisable.[119] Specifically, in the work on international standards, Switzerland should advocate for a critical review of liquidity requirements in the following areas:

- **Review of LCR outflow factors**: With regard to the LCR, it emerged that outflow rates in individual deposit categories – particularly large-volume deposits – were exceeded. However, other categories recorded lower outflows than provided for by the regulations. Adjustments to individual categories – for example, increases for large-volume deposits – are conceivable. An increase in the outflow factors in the LCR for short-term funding sources would also create incentives for banks to apply appropriate interest rates to motivate customers to make long-term savings or term deposits rather than sight deposits.

- **Use of liquidity buffers**: The Credit Suisse crisis has shown that it was unrealistic for the LCR to fall below 100% due to the associated stigma and that as a result, the buffer function of this ratio could not come into effect. However, flexible use of the liquidity built up with the LCR should be possible in crisis situations, to absorb liquidity shocks and ensure that payment obligations can be met even in exceptional stress situations. This can be achieved, for example, by the LCR standard being revised at international level such that the LCR requirement of 100% is divided into a buffer portion that it is explicitly possible to fall below and a minimum requirement that must be met at all times.

[119] BCBS, Report on the 2023 banking turmoil, October 2023, p. 24 f.

- **Minimum requirements within the LCR regarding the proportion of cash and credit balances held at central banks:** When a bank's foreign entity in particular has no access to the facilities of the relevant central bank, the monetization of assets may be restricted when needed. Within the framework of the LCR, a minimum requirement with regard to HQLA and to the proportion of cash and the credit balances held at central banks can reduce risk. This requires the entity concerned to have an account at the relevant central bank.

  The Credit Suisse crisis in March 2023 also showed that foreign payment and clearing agents in particular demanded extensive liquidity holdings. However, the introduction of a regulatory measure in this area would appear difficult, as this type of intervention would have to be made not only at national but also international level. Introducing an effective measure in this regard at national level is difficult, owing to the settlement of numerous business activities via foreign payment and clearing agents, and would have to be coordinated internationally.

- **LCR in significant foreign currencies**: In justified individual cases, under Article 17a paragraph 4 LiqO, FINMA can set a floor for the LCR in significant foreign currencies. However, the Credit Suisse crisis has shown that regulatory floors for the LCR in significant foreign currencies that go further than Article 17a paragraph 4 LiqO should be considered. A binding floor can be introduced for the LCR in significant foreign currencies – particularly the US dollar as a key refinancing currency – in order to reduce foreign currency imbalances.

- **Treatment of liquidity requirements in foreign entities**: The current requirement regarding trapping – that only the liquidity held under local requirements and exceeding the resulting outflows from the scenario should be recorded as trapped liquidity – assumes that the stress manifests similarly in all entities. This approach should be questioned. Cases in which there is not full transferability of liquidity within the financial group should lead to greater – if necessary even complete – exclusion of the liquidity held locally at group level. This may then mean that, in an extreme case, the liquidity of the relevant entity (or the entity's liquidity holdings that are not eligible for proportional recognition under the group requirement) would need to be held twice – once at entity level and once at group level.

- **Thresholds for short-term funding sources in the LCR**: To make the funding structure more stable and reduce vulnerability to bank runs, direct requirements (limits) can be imposed on banks regarding the maximum amount of short-term funding or withdrawal restrictions for deposits. However, this would mean an excessive intervention into the withdrawal options of bank customers and the business model of the banks. Depositors should not be bound by regulation to a bank, and thus exposed to a risk that they do not themselves wish to bear. Moreover, introducing withdrawal restrictions could mean that, in a crisis, bank customers would become even more suspicious of the bank concerned, owing to the limited amount that can be withdrawn, and might bring forward their deposit withdrawals, thereby potentially exacerbating the crisis. The bank has the ability to manage the maturity structure of its liabilities through the design of products such as savings deposits. By intervening directly in the design options for products rather that setting limits, appropriate regulation can bring about the desired behaviour through corresponding incentives. For instance, in the context of the LCR, funding sources with maturities of more than 30 days already receive preferential treatment. The special requirements for SIBs gave them further incentives for long-term funding and lengthened maturities beyond 90 days. In addition, the NSFR should ensure that a bank's stable funding is guaranteed over a one-year horizon. Banks react to these regulatory incentives with specific product offerings (e.g. for savings accounts and term deposits).

  Against this background, a milder variant could be considered, to limit unstable funding. In the LCR, thresholds for individual short-term funding sources could be imposed. The banks would be allowed to exceed these thresholds, but this would result in higher outflow factors in the LCR. This would enable banks to maintain flexibility regarding choice of funding but incentivise them to ensure a more diversified, and hence more stable, funding base.

- **Requirements for minimum holdings of non-HQLA eligible for central bank financing**: In a crisis, the reported LCR can only be considerably improved through the monetisation of non-HQLA. The obligation for banks to make a minimum volume of collateral eligible for ELA could be introduced to this end.

- **Definition of a requirement for a ratio of HQLA to total assets or leverage exposure**: Similarly to the leverage ratio, a parameter that is less reliant on outflow assumptions and less manipulable could also be introduced in the area of liquidity. This could be the ratio of HQLA to total assets or leverage exposure.

- **Strengthening funding structure stability (ASF factors of the NSFR)**: In the case of Credit Suisse, the NSFR did not sufficiently ensure a stable funding structure and revealed problems in the funding structure. Its parameterisation is too heavily focused on potential wholesale funding problems and takes too little account of the fact that customer deposits are not always stable. Available stable funding (ASF) factors for customer deposits – particularly in the area of large-volume deposits – could be adjusted to incentivise longer terms and stable deposits.

- **Institution-specific surcharges in the NSFR**: With the revised liquidity requirements for SIBs that entered into force on 1 July 2022, FINMA has the option of imposing institution-specific surcharges for liquidity risks that are not sufficiently covered by the LCR and basic requirements, or not covered at all. FINMA does not have a comparable possibility to intervene in the NSFR; this could therefore be considered in the case of risks in the funding structure (e.g. in the event of insufficient funding diversification).

8.5.2 Facilitating the diversification of funding sources

To facilitate the diversification of funding sources, the introduction of general legislation on covered bonds, taking into account the existing Mortgage Bond Act (MBoA), could be examined. Any assessment should bear in mind that such legislation, while helping the affected banks to diversify their funding sources, should not result in new or additional risks for the state or the taxpayer. Specific aspects such as interdependencies between covered bonds and the measures in the area of LoLR, as well as the planned PLB, would need to be taken into account. Under the MBoA, only mortgages are permitted as collateral. A Covered Bond Act could also provide for other assets, such as corporate loans, to be included in the coverage pool in addition to mortgages. By issuing covered bonds, banks could access another long-term form of funding and reduce their reliance on deposits and assistance from the SNB and the Confederation in a crisis. However, there are questions as to how this act would be differentiated from the existing MBoA. The existence of a Covered Bond Act would also give these securities the status of HQLA, making them attractive within the circle of potential buyers for banks to meet their liquidity requirements. This could result in further interconnectedness between banks.

8.5.3 Provision of information

Prompt, reliable data are a key prerequisite for authorities to recognise a liquidity crisis at an early stage and manage it. Although this is already implicitly required in Article 7 LiqO, explicitly including the necessary capabilities for data processing and provision would create greater clarity and security. Equally, the possibilities for prompt simulation of changing scenarios by the banks could be further improved.

8.5.4 Conclusion and proposed mix of measures regarding the three lines of defence in the area of liquidity

The corresponding discussion can be found in section 10.4.2.

9 Lender of last resort

9.1 Background

9.1.1 Definition of "lender of last resort"

Among other things, the SNB is tasked with providing liquidity to the Swiss franc money market (Art. 5 para. 2 let. a NBA) and contributing to the stability of the financial system (Art. 5 para. 2 let. e NBA). Based on this mandate, it acts as lender of last resort (LoLR) in a crisis.[120] Recourse to the LoLR is the second line of defence, when a bank's own liquid assets are insufficient to cover liquidity needs in a crisis.

LoLR describes the function of central banks to maintain the stability of the financial system in times of crisis by providing liquidity assistance. If banks are no longer able to refinance via the market, central banks can provide liquidity against collateral subject to certain conditions in their role as lenders of last resort. In Switzerland, the main instrument for this is Emergency Liquidity Assistance (ELA).

However, the concept of LoLR can be interpreted less narrowly and the function need not be confined to the provision of ELA.[121] The LoLR function can also encompass a broader range of central bank facilities, including ordinary facilities. In Switzerland, the liquidity-shortage financing facility (LSFF) and the intraday facility are available for this purpose. In this report, the term LoLR is understood to mean the function of providing liquidity assistance in a crisis, irrespective of whether this assistance is provided under ordinary or emergency facilities.

What is not in dispute is that a central bank, in its role as lender of last resort, should only be called upon to act in a subsidiary capacity, once market funding dries up. A distinction should be made between this and monetary policy operations, which are carried out regularly.

9.1.2 Ordinary liquidity assistance from the SNB[122]

9.1.2.1 Liquidity-shortage financing facility

As part of its ordinary facilities, the SNB provides banks with an LSFF to bridge unexpected short-term liquidity shortfalls. These occur, in particular, when expected payments are not forthcoming and the required funds cannot be obtained in good time on the interbank market. The LSFF can be accessed via a special-rate overnight repo transaction. The prerequisite for engaging in special-rate repo transactions is the granting of a credit limit by the SNB and the ongoing coverage of at least 110% of this limit with collateral eligible for SNB repos. Such securities are high-quality liquid assets (HQLA).[123] The limit defines the maximum possible liquidity withdrawal by a bank.

9.1.2.2 Intraday facility

Under the intraday facility, the SNB provides banks with interest-free liquidity during the day via repos, in order to facilitate the settlement of payment and foreign exchange transactions. At least 110% of the intraday liquidity drawn must be covered by collateral eligible for SNB repos. The liquidity obtained must be repaid by the end of the same working day at the latest.

9.1.3 Emergency liquidity assistance: the SNB's ELA

9.1.3.1 Purpose and design

If a domestic bank's own holdings of liquid assets are insufficient and it is no longer able to refinance itself on the market, the SNB can provide it with liquidity in the form of ELA. This is necessary because it is neither realistic nor economically sound for banks to maintain liquidity levels high enough to ensure that they can withstand, say, a bank run of any magnitude without external assistance.[124] Thus, from an economic standpoint, although banks should first and foremost make their own funding provisions, the central bank's LoLR function is advisable and necessary.

[120] As regards LoLR, see also the SNB special topic, The SNB's role as lender of last resort

[121] Tucker expert opinion, p. 30, footnote 27

[122] SNB, Guidelines of the Swiss National Bank on monetary policy instruments of 25 March 2004 (as at 5 May 2023), section 2.2

[123] See section 9.2.5 for more details

[124] See also Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 24, and Group of Thirty (G30), Bank Failures and Contagion: Lender of Last Resort, Liquidity, and Risk Management, 9 January 2024, p. 2

A distinction should be made between ELA and the SNB's ordinary facilities that are secured with HQLA. These facilities serve to smooth the functioning of cashless payment systems (Art. 5 para. 2 let. c NBA) and allow banks to temporarily increase their cash holdings and thereby meet their payment obligations at any time. This can also be very useful in a crisis.

Yet, in an acute crisis, the usefulness of liquidity assistance granted against HQLA collateral – i.e. assets that are highly liquid in any case – is generally limited and does not improve the reportable liquidity ratios, for example.[125] Beyond the ordinary HQLA-backed facilities, ELA is designed to allow the SNB to provide a bank with liquidity against additional collateral – in particular less liquid and marketable types of collateral. The aim is to avoid solvent banks becoming insolvent simply because their illiquid assets cannot be liquidated in time, or only at high cost.

The NBA sets out the principle that sufficient collateral be provided for loans (Art. 9 para. 1 let. e NBA). The legal concept of "sufficient collateral" in the Act is undefined and intentionally provides the SNB with broad discretion, according to the dispatch.[126]

The provision of ELA is set out in detail in the Guidelines of the Swiss National Bank on monetary policy instruments.[127] According to the Guidelines, access to ELA depends on the following conditions being met:

- The bank or group of banks seeking credit must be of importance for the stability of the financial system. This condition does not refer to the legal definition of a SIB under Article 7 BankA. Thus, the SNB can also grant ELA to non-systemically important banks.
- The bank seeking credit must be solvent.[128]
- The liquidity assistance must be fully backed with sufficient collateral at all times.[129]

The SNB can therefore use ELA as an instrument to aid the stability and stabilisation of the financial centre. However, the SNB does not have the power to issue instructions, i.e. it cannot order a bank to prepare or avail itself of ELA. Even if the bank has prepared the requisite collateral, it has no claim to liquidity assistance from the SNB. The SNB decides on applications on a case-by-case basis at its own discretion.

9.1.3.2 Collateral eligible for ELA

For ELA, the SNB accepts a wider range of collateral than for its ordinary facilities, in particular securities that do not count as HQLA, and are thus of lower quality or illiquid.[130]

Owing to their high volumes, value retention and standardisation, mortgages on real estate in Switzerland are an important component of ELA collateral. Under ELA, the SNB accepts mortgage collateral of households and companies with loan-to-value (LTV) ratios of up to 100%. In line with the idea of a second line of defence, the pool of accepted mortgages is much broader than those that can be used for mortgage bonds when refinancing in the market. For instance, the SNB also accepts commercial mortgages (Pfandbrief banks: only residential mortgages) and real estate with an LTV ratio of up to 100% (Pfandbrief banks: up to 80%).[131] Mortgages account for around 85% of domestic lending volume.[132]

Besides mortgages, securities other than HQLA are accepted as collateral for ELA. Specifically, the SNB also accepts shares, securitisations (e.g. mortgage-backed securities and asset-backed securities), and low-rated or foreign currency-denominated bonds. In addition, operational aspects apply, such as deliverability to the SNB. Through the SNB's use of foreign custodians, securities booked abroad can also be used for ELA purposes.

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[125] The limited use of liquidity assistance against HQLA collateral can be attributed to the fact that, as a rule, HQLA can be monetised on the market by the bank itself. However, scenarios are also conceivable in which a bank loses access to the market and these HQLA can be used to obtain liquidity from the central bank

[126] BBl **2002** 6097, 6199

[127] SNB, Guidelines of the Swiss National Bank on monetary policy instruments of 25 March 2004 (as at 5 May 2023), section 6

[128] The solvency condition can be replaced by a credible resolution plan which restores the bank's solvency

[129] Article 9 paragraph 1 letter e NBA

[130] SNB, The SNB's role as lender of last resort, question 4 "How does the SNB determine the collateral for emergency liquidity assistance?"

[131] Pfandbrief bank, Pfandbrief bank pool at 31 January 2022, charts 4.3 and 4.6

[132] SNB, Introductory remarks by the Governing Board, news conference, 21 September 2023, p. 5

Non-mortgage-backed domestic credits (such as overdraft facilities for companies, investment loans, etc.) cannot be used directly as collateral, but must first be securitised.

In addition, the SNB accepts securitised foreign loans as collateral for ELA purposes.[133] Conversely, it does not directly accept (unsecuritised) foreign loans, owing to the risk of ring-fencing[134] in the event of a bank failure, as well as unforeseeable local legal and realisation risks.

To take account of repricing risk, haircuts are applied to all collateral classes as buffers (hypothetical example: a mortgage claim of 100 allows ELA of 80 to be granted, and the haircut is 20). The haircuts depend on the collateral concerned, and are assessed and set by the SNB separately for each collateral class. For example, the haircut for a well diversified mortgage portfolio is between 10% and 15%. These haircuts refer to mortgage credits after deduction of the relevant mortgage customers' non-privileged deposits. The haircut is due to the fact that, in the event of a bank failure, mortgage customers with non-privileged deposits can request the SNB to offset the mortgage debt.[135]

9.1.3.3 Preparations for the granting of ELA

To reflect the emergency lending character of this instrument and to reduce moral hazard, ELA cannot simply be drawn on – unlike the ordinary facilities – but has to be requested by a bank and approved by the SNB Governing Board, which decides at its own discretion. One of the criteria for receiving ELA from the SNB is that the bank is solvent and viable, or that measures have been initiated to restore this state. When assessing solvency in the context of a request, the SNB needs a confirmation of solvency from FINMA.

The ELA processes are set out in Memoranda of Understanding[136] and are regularly tested with all SIBs. To date, such MoUs have been concluded with all five (now four) SIBs. The tests involve the delivery of collateral (securities, mortgages), the management thereof (e.g. substitutions) and the provision of liquidity (Swiss francs and foreign currency). To ensure that the tests are as close to reality as possible, they take place "in production", i.e. the collateral is actually delivered to the SNB and the envisaged legal documentation is employed. The SNB uses these tests to ensure that the operationally complex and time-critical recourse to ELA functions as planned in case of need.

The requisite preparations by a bank to make collateral transferable are of both a legal and an operational nature:

- As part of the legal preparations, the bank must ensure that, in the case of mortgages for instance, customer contracts allow the mortgage to be assigned to third parties and that the associated promissory notes can be transferred to third parties.
- As part of the operational preparations, the bank must, for example, have IT systems that can select and reserve the mortgages intended as collateral for ELA, so that mortgages are not used more than once to secure transactions.

In the case of securities, the corresponding delivery channels must be set up and tested.

These preparations can be very costly for banks and are time-consuming, for example if a large number of customer contracts need to be modified or if loans granted by the bank need to be securitised in order to make this collateral transferable. Accordingly, this work cannot be done at short notice – when a crisis is developing – but requires longer-term planning and preparation.

9.2 International comparison

9.2.1 Putting ELA into context

The terms "emergency lending" and "emergency liquidity assistance" do not have the same meaning in all jurisdictions as they do in Switzerland. For example, in some other countries the finance ministry is involved in the decision to provide emergency liquidity through the central bank, and can also assume the risk of loss. As outlined above, the LoLR function in some countries can also be part of the ordinary facilities.

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[133] Foreign loans are loans involving foreign customers or foreign jurisdictions, or which are booked abroad

[134] In this report, the term "ring-fencing" is used to define higher regulatory requirements or restrictions on fund outflows imposed by foreign authorities on the subsidiaries or branches of a Swiss bank

[135] Privileged deposits are credit balances at domestic and foreign branches of Swiss banks and securities firms, up to a maximum of CHF 100,000 per creditor

[136] These MoUs are concluded between the SNB and the banks, and are not in the public domain

In general, the following can be said about ELA in the euro area, the UK, the USA and Canada:

- In the euro area, "emergency liquidity assistance" denotes the provision of liquidity by the central bank outside the framework of ordinary facilities, subject to the conditions of solvency and sufficient cover.[137]

- In the UK, emergency liquidity assistance can also have a fiscal component. Upon the instruction and on behalf of HM Treasury, and subject to a corresponding assumption of the risk by the state, deviations from the principles of solvency and sufficient cover are possible.[138]

- The criteria for emergency lending (Federal Reserve Act 13(3)) in the USA are solvency and sufficient collateral. Moreover, the facility must be available to a broad circle of participants (broad-based eligibility). In March 2023, the Bank Term Funding Program was introduced as part of the emergency lending facilities. The Federal Reserve (the US central bank) was compensated with a backstop from the US Treasury for waiving a risk haircut on the collateral accepted under the programme.[139] Facilities for only one specific institution, lending to entities that are insolvent or lending against insufficient collateral are excluded.

- In Canada, ELA is aimed at supporting the removal of a persistent liquidity shortfall at a bank, subject to the criteria of solvency and sufficient cover. Under ELA, higher amounts of credit can be made available, and at longer terms, than under the ordinary facilities. In a banking crisis, ELA can also be used during the stabilisation phase and in the event of a restructuring or liquidation in which the systemically important functions are maintained.[140]

9.2.2 Eligible financial institutions

In other countries, just as at the SNB, central bank liquidity assistance is granted only to banks or bank entities that are subject to supervision in the corresponding jurisdiction.[141] In the USA, the Fed can also provide liquidity assistance to non-banks as part of emergency lending, with the agreement of the Treasury Department (Federal Reserve Act 13(3).

9.2.3 Solvency criterion

The criterion of a bank being solvent in the context of granting emergency liquidity assistance outside the ordinary facilities is standard at central banks.[142] Like the SNB, the ECB and the Bank of Canada also provide for the solvency criterion to be replaced by a restructuring plan with which solvency can be restored. By contrast, in the USA, the Fed's options for assisting financially weak banks are limited. For example, solvent but financially weak banks can lose access to certain ordinary facilities. Instead, the US Federal Deposit Insurance Corporation (FDIC) has a greater role, in which it takes over failing banks and temporarily provides the necessary funds.

9.2.4 Collateral

The requirement for the central bank to provide liquidity assistance only against collateral is in line with a key, internationally recognised principle of the LoLR function, although in some regimes this collateral can also be supplemented or replaced by state loss guarantees for the central bank.[143] Various foreign central banks have ordinary facilities under which banks experiencing a liquidity shortfall can access liquidity against a broad range of collateral. With an interest rate above the market rate, the pricing is generally designed to make it unattractive for the bank to obtain liquidity through this facility under normal circumstances. This creates incentives to refinance on the market in normal times (mitigation of moral hazard).

[137] Moreover, this is borne by the national central bank, rather than the Eurosystem. However, control still lies with the ECB, in particular with regard to the monetary policy implications, see ECB, Emergency liquidity assistance and monetary policy

[138] Bank of England, Memorandum of understanding on resolution planning and financial crisis management, p. 7 No. 39, October 2017: "Where the Chancellor directs the Bank to conduct a support operation, either to the financial system as a whole or to one or more individual firms, the Bank will act as the Treasury's agent. The Bank will set up a Special Purpose Vehicle (SPV), separate from the Bank's balance sheet, to effect the support operation. The Bank and the Vehicle will be indemnified by the Treasury."

[139] Press release of the Board of Governors of the Federal Reserve System, Federal Reserve Board announces it will make available additional funding to eligible depository institutions to help assure banks have the ability to meet the needs of all their depositors, 12 March 2023

[140] Bank of Canada, Emergency Lending Assistance

[141] CGFS, Designing frameworks for central bank liquidity assistance: addressing new challenges, CGFS Papers No 58, April 2017, chapter 4

[142] CGFS, Designing frameworks for central bank liquidity assistance: addressing new challenges, CGFS Papers No 58, April 2017, chapters 5 and 6

[143] CGFS, Designing frameworks for central bank liquidity assistance: addressing new challenges, CGFS Papers No 58, April 2017, chapters 5 and 6

9.2.5 Facilities in an international comparison

A comparison of the various LoLR systems and capacities is complex, because this encompasses both the option of liquidity assistance in a crisis via both ordinary facilities and the ELA that goes beyond this. It is easiest to compare the ordinary facilities, as there is generally a good body of publicly available information, unlike for ELA.

A comparison of the loans and securities accepted under the SNB's ordinary facility (LSFF) with those of the Eurosystem, the Bank of England, the Fed and the Bank of Canada shows that these foreign central banks accept a broader range of collateral (see Table 7). For example, under the LSFF, only HQLA securities are eligible, but not mortgages, whereas at foreign central banks, the pool of eligible collateral goes beyond that, and includes loans and non-HQLA. Foreign banks thus have more options for obtaining liquidity via ordinary facilities than Swiss institutions. Foreign loans[144] and shares are excluded under ordinary facilities at all the central banks considered.

		SNB		Eurosystem	Bank of England	Federal Reserve	Bank of Canada	Eurosystem, Bank of England, Federal Reserve[9] Emergency facilities
		Ordinary facility	"Emergency facility"	Ordinary facilities			Ordinary/ emergency facility[7]	
		LSFF	ELA	Marginal Lending Facility	Discount Window	Discount Window	Standing Repo Facility/ELA[7]	
Loans	Mortgages to households	No	Yes	No[2]	Yes	Yes	Only for ELA[8]	No publicly available information[9]
	Companies	No	If mortgage-backed; other loans if securitised	Yes	Yes	Yes	Yes	
	Other loans to households	No	If securitised	No[2]	Yes	Yes	Yes	
	Foreign loans	No	If securitised	No[3]	If securitised	No[6]	No[3]	
Securities	Shares	No	Yes	No	No[5]	No	No	
	Government bonds	Yes[1]	Yes	Yes	Yes	Yes	Yes	
	Corporate bonds	Yes[1]	Yes	Yes	Yes	Yes	Yes	
	Securitisations	Yes[1]	Yes	Yes	Yes	Yes	Yes	
	Requirements on currencies and foreign securities	Issuer from CH, EU, EEA, UK	All significant currencies accepted; clearing via foreign custodians possible for foreign securities	Settlement in euro area, denominated in euros[4]	"Generally only securities from UK, USA, EEA"	"Stricter requirements if not in USD (e.g. no ABS)"	"Only in CAD and USD"	

[1] HQLA.
[2] With exceptions under „Additional Credit Claims" (ACC): Since 2011, national central banks have been allowed to accept other loans as a temporary measure (Temporary Framework). A review is planned for 2024. National central banks that accept mortgages are the exception.
[3] Possible in securitised form.
[4] Temporary extension (Temporary Framework) to USD, GBP, JPY.
[5] Technical measures were introduced in case of need.
[6] Possible in individual cases under certain circumstances.
[7] This column applies to both the ordinary „Standing Repo Facility", and the emergency „ELA" facility. The only difference between these facilities is in the eligibility of mortgages as collateral; the Bank of Canada accepts them only for ELA; see footnote 8.
[8] Mortgages are accepted as collateral only for ELA, and only if no other collateral is available.
[9] Eligible collateral under the Federal Reserve's emergency facilities is determined on a case-by-case basis, and thus no general statement is possible.

Source: Own presentation, based on publicly available information from the central banks.

Table 7: International comparison of accepted collateral; status December 2023

[144] These are loans involving foreign customers or foreign jurisdictions, or which are booked abroad

If we compare the pool of eligible collateral under ordinary facilities abroad with the assets accepted by the SNB under the ELA facility, the range of eligible collateral is hard to compare. For example, under the Swiss ELA, shares are accepted and the requirements in terms of the issuer's domicile and the currency of a security are generally less strict. Unlike the foreign central banks, however, the SNB accepts non-mortgage loans to companies and households only in securitised form.

Performing a comparison of emergency facilities – which is ultimately more decisive – is even harder. A lack of publicly accessible information means that there are no details available about ELA in the EU, the UK and the USA. Accordingly, a full comparison of the extent of liquidity assistance through ELA is not possible. A full comparison of the haircuts applied by the central banks is likewise not possible with the available data.

9.3 Assessment

9.3.1 Operational implementation of ELA and foreign currency needs

The ELA instrument, which was developed on the basis of the comprehensive revision of the NBA in 2003, was used in Switzerland for the first time during the Credit Suisse crisis (for a more comprehensive description of the Credit Suisse crisis, see chapter 5). In the process, it emerged that the procedures for providing liquidity under ELA (as well as ELA+ and the PLB) were, as expected, complex but that they functioned smoothly, especially since the SNB had regularly practised and tested this provision together with the banks, and had set up channels for obtaining foreign currency.[145]

A large proportion of the liquidity assistance provided by the SNB was in foreign currency. This became necessary because Credit Suisse had lost access to the foreign exchange swap market. The provision of liquidity in foreign currency was carried out successfully.

9.3.2 Scope of liquidity potential via the LoLR

Given the huge outflows at Credit Suisse and the high level of liquidity holdings demanded by payment and clearing agencies in March 2023, the LSFF and ELA – in addition to the bank's own liquid assets – proved to be insufficient. The gap had to be bridged with ELA+ and the activation of a PLB under emergency law. The ELA+ instrument, which was created under emergency law and is only a temporary measure, was decisive, together with the available LSFF and ELA, in ensuring Credit Suisse's liquidity up to the weekend of 18 and 19 March 2023, and thus allowing a solution to be implemented that would ensure financial stability.

To avoid recourse to emergency law, a sounder provision of own funds, more stable funding, greater potential for liquidity provision via the LoLR and the envisaged legal anchoring of the PLB (see chapter 10) would have been necessary. Among other things, the collateral that Credit Suisse had prepared operationally for obtaining ELA under the existing arrangements was not sufficient. For example, it was not possible to transfer the entire eligible mortgage volume of the Swiss subsidiary to the SNB. Likewise, a large volume of lombard loans[146] from the parent bank could not be used, as the securitisation required by the SNB had not taken place.

Moreover, as mentioned above, the SNB does not have the power to instruct a bank to make operational preparations for ELA.

Furthermore, the high volume of foreign assets could not be used for a more wide-scale recourse to liquidity using foreign central bank facilities. In the wake of the turbulence of March 2023, the US authorities encouraged banks to factor the Discount Window more firmly into their contingency funding plans.[147]

[145] The SNB can create Swiss francs, but not foreign currency. If it does not have sufficient foreign currency in its reserves, it has to try and obtain it on the market or from the relevant central banks

[146] In its 2021 annual report, Credit Suisse Group reported a volume of around CHF 50 billion in lombard loans (i.e. asset-backed loans to private individuals). Other asset-backed loans went to corporate borrowers. See Credit Suisse Group AG, Annual Report 2021

[147] Federal Reserve System, Addendum to the Interagency Policy Statement on Funding and Liquidity Risk Management: Importance of Contingency Funding Plans, 28 July 2023

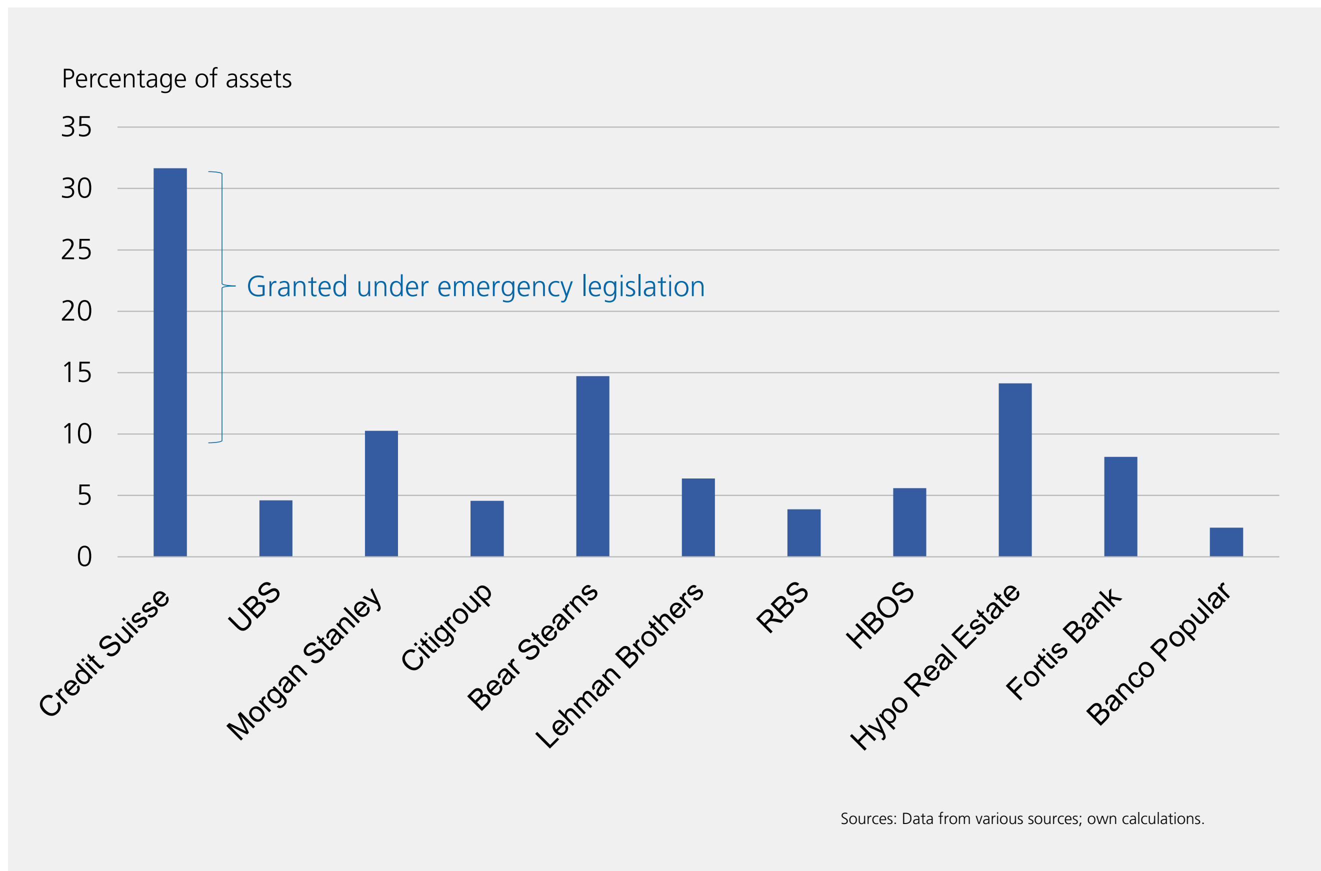

Figure 6: Central bank liquidity assistance

However, it should be borne in mind in the assessment that Credit Suisse's liquidity requirement exceeded all previous empirical values. Chart 6 compares the assistance provided to Credit Suisse with other cases of liquidity assistance by central banks, with the assistance placed in proportion to total assets.[148] On average, the assistance drawn by these banks amounted to some 6% of total assets, with the highest just under 15%. In many cases (namely Hypo Real Estate, Fortis, RBS, HBOS and the Fed's Commercial Paper Funding Facility), the central bank liquidity assistance was fully or partly secured by state guarantees. At Lehman Brothers (6% of total assets)[149] and Banco Popular (2% of total assets), a lack of collateral eligible for central bank assistance was one of the reasons for their subsequent demise.Under LSFF and ELA, Credit Suisse drew down a total of CHF 48 billion, or 9% of total assets. The amount provided by the SNB rises to CHF 168 billion, or 32% of total assets, if ELA+ and PLB loans

148 The chart is based on own calculations of publicly known liquidity operations according to the following sources: Federal Reserve (https://www.federalreserve.gov/newsevents/reform-transaction-data.htm), Bloomberg (https://www.bloomberg.com/news/articles/2011-08-21/wall-street-aristocracy-got-1-2-trillion-in-fed-s-secret-loans), SNB (2023 Financial Stability Report and press release of 8 November 2013 at https://www.snb.ch/en/publications/communication/press-releases/2013/pre_20131108), Ian Plenderleith (https://www.bankofengland.co.uk/-/media/boe/files/news/2012/november/the-provision-of-emergency-liquidity-assistance-in-2008-9), Bruegel (https://www.bruegel.org/blog-post/emergency-liquidity-assistance-new-lease-life-or-kiss-death) and National Bank of Belgium (https://www.nbb.be/doc/ts/publications/nbbreport/archives/nbb2008art2.pdf). Generally, a broad definition of liquidity assistance was applied: for example, market-wide operations via auctions during the global financial crisis are included if corresponding data is available for individual banking institutions

149 Speech by Ben Bernanke, Reflections on a Year of Crisis, 21 August 2009: "Concerted government attempts to find a buyer for the company or to develop an industry solution proved unavailing, and the company's available collateral fell well short of the amount needed to secure a Federal Reserve loan of sufficient size to meet its funding needs."

granted under emergency law are also included. More than two thirds of the liquidity assistance received was thus granted on the basis of instruments created under emergency law.

The comparison makes clear that Credit Suisse's liquidity requirements were exceptionally high in historical terms. The additional volatility caused by the fast pace of digital information transfer and digital banking is likely to tendentially increase the magnitude of potential liquidity outflows. Therefore, in future the LoLR regime must – together with the first and third lines of defence – also make provision for such extreme scenarios.

9.3.3 Use of ELA and the stigma effect

Both the SNB (monthly balance sheet, quarterly and annual report) and the supported bank (regular reports, ad hoc disclosure of price-sensitive information under stock exchange law) publish information that could directly reveal the use of ELA, or at least give strong indications to that effect. In addition, the drawdown of large amounts can also come to the attention of market participants via other information channels. Large outflows (e.g. of deposits) are also visible in the context of the bank's regular reporting, even if the recourse to ELA has not been disclosed. Apart from the legal and stock exchange requirements, there is always the risk of information being leaked. As a result, the use of ELA can only be concealed for a very short time.

If it becomes known that ELA has been obtained from a central bank, this can either strengthen or weaken confidence in a bank, depending on the circumstances:[150]

- A negative effect can arise if an individual bank obtains a large amount and no further accompanying measures are taken to strengthen the bank, or if the market and depositors consider the accompanying measures to be insufficient. In this case, the market and depositors may interpret the provision of ELA as weakness, which is likely to increase outflows even more and, in turn, exacerbate the crisis at the bank.
- A positive impact can be expected if ELA is provided in response to a systemic problem or as part of an overall package of measures that the market and depositors view as convincing, which improves the situation of the individual bank and restores confidence.

Owing to concerns that recourse to liquidity could become public at an inconvenient time and might be perceived by the market and depositors as weakness, banks are reluctant to avail themselves of ELA (stigma problem). A reluctant attitude was also observed during the Credit Suisse crisis. Instead of availing themselves of ELA, banks tend to liquidate assets on the market at an inconvenient time, thus incurring losses ("fire sales"), or to postpone liquidity-intensive stabilisation measures.

The stigma problem is not only relevant with regard to Swiss ELA. It also attaches to facilities at foreign central banks. A survey by the Bank Policy Institute backed by US banks concluded that the stigma problem also arises in connection with the Federal Reserve's discount window.[151] This view is shared by the former Chair of the Federal Reserve Board of Governors.[152] A study by the Bank of England's Independent Evaluation Office found that recourse to a discount window is viewed by banks as a measure comparable to ELA.[153]

The stigma problem manifests itself in the number of withdrawals made under the discount window. Since the facility was set up in 2008, not one single withdrawal has taken place via the Bank of England's discount window.[154] At the Fed, the maximum amount outstanding via the discount window in the USA during the global financial crisis was around USD 100 billion (less than 1% of all US bank assets). The picture is similar for the ECB's marginal lending facility.[155]

To tackle the stigma issue, the Federal Reserve increased the soundness requirements for recourse to liquidity under the discount window (primary credit). The increase in the requirements was intended to signal that liquidity would only be provided to sound banks, which in turn was intended to reduce the stigma surrounding such

[150] See also CGFS, Designing frameworks for central bank liquidity assistance: addressing new challenges, CGFS Papers No 58, April 2017, chapter 8

[151] Nelson and Waxman, Bank Treasurers' Views on Liquidity Requirements and the Discount Window, Bank Policy Institute, 12 October 2021

[152] Speech by Ben Bernanke, Liquidity provision by the Federal Reserve, 13 May 2008

[153] Bank of England Independent Evaluation Office, Evaluation of the BoE's approach to providing sterling liquidity, January 2018, p. 12, section 2.2: "Our external outreach exercise suggested that firms view it as akin to emergency liquidity assistance, to be used reluctantly in the event of a very severe stress – and possibly only after damaging actions have been taken […]."

[154] Bank of England Database, available at: https://www.bankofengland.co.uk/boeapps/database/

[155] European Central Bank (Statistical Data Warehouse), available at: https://data.ecb.europa.eu/

recourse. However, studies by the Federal Reserve Bank of New York have concluded that stigma around the discount window continues[156] and is a general problem for bilateral facilities, even if they are ordinary facilities [157]

9.3.4 Challenges with regard to G-SIBs

For G-SIBs, the provision of ELA comes with additional challenges compared to non-internationally active SIBs. G-SIBs have complex structures and major foreign entities. Typically, the collateral accepted for obtaining liquidity from the SNB is asymmetrically distributed across the G-SIB group:[158] most collateral for delivery to the SNB is held in Swiss subsidiaries. The parent banks do have access to the SNB's ELA, but currently have only a very limited amount of ELA-eligible collateral compared to their potential needs. Yet, in a crisis such as that of Credit Suisse, liquidity needs may become very high, especially at the level of the parent bank.

This situation can present challenges as regards a) the transfer of collateral and liquidity within the group, and b) assets held abroad, as demonstrated in exemplary fashion by the Credit Suisse crisis:

- The transfer of collateral or liquidity within the group poses challenges: the SNB's counterparties are the G-SIB's Swiss entities, i.e. the parent bank and the Swiss subsidiary. However, the parent bank holds only very limited amounts of eligible collateral. As for the collateral at the subsidiary, there is a limit on how much can be transferred to the parent bank and from there to other group entities, owing to the requirements of the emergency plan (protection of systemically important functions in Switzerland). Moreover, additional limitations may be imposed by management, for instance to reduce the Swiss subsidiary's risk exposure.

- Whereas securities located abroad can also be delivered via foreign custodians, non-mortgage domestic loans (a heterogenous mix of wealth management loans, overdraft facilities for companies and investment loans) and foreign loans in Switzerland may not be directly used as collateral. The SNB accepts them only in securitised form, which implies that the bank will have to prepare corresponding securitisation structures. Another way to alleviate the problem is via access to foreign facilities.

9.3.5 Interaction with first and third lines of defence

With regard to ensuring liquidity through the LoLR as part of the second line of defence, questions arise concerning delineation and possible incentives compared to the first, and also the third, line of defence.

Compared to the first line of defence, ensuring sufficient liquidity by means of the bank's own assets, there is a risk that banks will rely too heavily on the LoLR and neglect their own liquidity management. This is generally tackled through regulatory requirements on a bank's own liquidity (liquidity regulations) and ELA fees that are above market rates. Moreover, in practice, stigma is a key factor dissuading institutions from using ELA.

There is also the risk that the transfer of collateral to the SNB and foreign central banks, in order to increase the volume of collateral eligible for ELA, is not well enough prepared in legal (e.g. customer contracts) and operational (e.g. IT systems) terms. To date, the potential benefits in a crisis have not been accorded enough weight by the banks for them to take the costs of preparation on board. The bank thus achieves considerable cost savings in good times, but in a crisis the lack of preparation can make a more significant state intervention necessary. In this regard, it should be noted that, to date, there has been no economic incentive for banks to undertake costly preparations, apart from the potential benefits in a crisis.

The revised liquidity requirements for SIBs, which are to be fully complied with by end-2024, have now introduced such incentives to increase the volume of collateral eligible for ELA for the first time, by allowing a certain amount of the mortgage receivables prepared as ELA collateral to be recognised for the purpose of meeting the liquidity requirements (see Art. 20*a* para. 3 LiqO). The PLB proposal contains a further incentive mechanism: the higher the amount of collateral prepared for ELA, the lower the ex ante lump sum to be paid by the SIBs (see Art. 32c para. 4 Draft BankA[159]). These incentives are likely to be quite effective.

The introduction of a PLB will also give rise to an interaction between the second and third lines of defence. Liquidity needs in a crisis essentially depend on the size and structure of the affected SIB's liabilities and the scale

[156] Armantier et al., History of Discount Window Stigma, Liberty Street Economics, 10 August 2015

[157] Lee and Sarkar, Is there Discount Window Stigma in the United Kingdom?, Liberty Street Economics, 12 September 2016: "[We] conclude that bilateral lending by central banks may tend to become stigmatized to some extent, no matter how the lending facility is structured."

[158] Expert Group on Banking Stability 2023, Need for reform after the demise of Credit Suisse, 1 September 2023, p. 49-50

[159] BBl **2023** 2166

of the loss of confidence. Accordingly, in the case of Credit Suisse too, the total requirement was determined by assessing the liabilities: the potential maximum requirement was calculated from the sum of liabilities that might be subject to short-term outflows, plus an additional safety buffer. From this, the potential ELA (and, in the case of the package of measures for Credit Suisse, ELA+) was deducted, to determine the level of the PLB to be provided.

This new constellation brought about by the PLB also means that the distribution of the total liquidity assistance required between ELA and the PLB is heavily influenced by the level of ELA, without the Federal Council or Parliament's Finance Delegation – which are responsible for the decision to grant the guarantees needed for the PLB – having any sway over this.

Conversely, it should be noted that a higher ELA capacity not only reduces the scope of any PLB required in a restructuring, but also has the effect that, in any restructuring, more assets are already used in connection with the provision of ELA and thus fewer assets would be available to cover claims from a granted PLB.

Even so, the distribution of potential liquidity assistance between the second and third lines of defence is not a zero-sum game, in the Federal Council's view. There are clear advantages to having a higher second line of defence – and hence a lower requirement for the third line of defence. For one thing, the implementation of ELA in a crisis is operationally advantageous, partly because fewer players are involved. Above all, however, from the state's perspective, it is preferable to provide liquidity against collateral before issuing guarantees.

Finally, an expansion of LoLR potential can also increase the potential for liquidity provision under the second and third lines of defence overall, because more collateral is prepared for delivery to the SNB – and could thus be available to the Swiss authorities in a crisis situation, rather than already being reserved by other creditors.[160]

9.3.6 ELA for non-systemically important banks[161]

The crises surrounding Silicon Valley Bank, Signature Bank and First Republic Bank in the USA in March 2023 have shown that, in certain circumstances, banks of different sizes and with different business models can get into situations in which they very rapidly need liquidity and have the potential to destabilise the financial system. Against this background, there might also be cases in Switzerland where ELA for non-systemically important banks could contribute to financial stability.[162]

The existing legal framework does not limit the circle of banks that can, in principle, receive ELA. The NBA allows the SNB to engage in lending activities with "banks and other financial market participants". Whereas, to date, ELA has been provided for SIBs, under the initiative "liquidity against mortgage collateral" the SNB will be able to grant liquidity to all banks against mortgage collateral in the future.[163] The initiative was launched in 2019 and implementation began last year with a pilot project. The SNB informed all banks of the plans at the end of July 2023.

While mortgages represent a significant illiquid balance sheet item for banks that are active in domestic lending business (85% of all domestic loans are mortgages[164]), banks that have little or no relevant mortgage business when compared to total assets (e.g. wealth management banks) benefit little or not at all from this programme.

Banks should expect to take one to two years to achieve process readiness. During the preparatory period, participating banks will have to, in particular, adapt internal processes, insert transfer clauses into their customer contracts and carry out a change of creditor for their registered promissory notes. Implementing the preparations at short notice and only when needed is not feasible. As well as contributing to financial stability, the initiative aims to increase the efficiency of banking business through further digitalisation of the mortgage network. The greater the number of banks preparing these liquidity recourse options, the wider the SNB's range of possible actions will be when required. In the development phase and prior to the Credit Suisse crisis, various banks

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[160] Tucker also underlines this point. Moreover, he takes the view that the delineation between the second and third lines of defence should be clarified by the legislator, owing to its importance. Tucker expert opinion, p. 93

[161] Tucker expert opinion, p. 92, Recommendation 2

[162] IMF, Financial Stability Assessment Program Switzerland 2019, 26 June 2019, Paragraph 70: "The SNB should issue policies and procedures supporting its authority to provide ELA to any bank that is considered systemic and viable under certain circumstances."

[163] SNB, Introductory remarks by the Governing Board, news conference, 21 September 2023, p. 4

[164] SNB, Introductory remarks by the Governing Board, news conference, 21 September 2023, p. 5

declined to take part in a pilot scheme, citing, among other things, the cost and their – in their estimation – high degree of soundness.

9.4 Possible measures

The following sections discuss the range of possible measures in the area of lender of last resort. Due to their interdependencies, the measures are assessed as a whole together with the liquidity requirements and public liquidity backstop measures discussed in the earlier and subsequent chapters. Accordingly, section 10.4.2 presents conclusions on the three lines of defence in the area of liquidity, and proposes a specific mix of measures.

9.4.1 Expanding the potential for liquidity provision through the LoLR

One possible measure is to significantly expand the potential for providing liquidity via the SNB in its role as lender of last resort. With regard to this objective, as part of the implementation of postulate 23.3445 "Review of the SNB's toolkit" and taking into account the SNB's constitutional mandate, the existing legal framework for the LoLR should be reviewed and refined where necessary. The SNB's mandate to supply the Swiss franc money market with liquidity and contribute to the stability of the financial system should be reconciled with that of ensuring price stability.

Although the need for adjustments should be clarified while keeping an open mind with regard to results, deliberations should be guided by certain fundamental principles:

- The LoLR provides liquidity against collateral.
- The LoLR function should include both ordinary and emergency facilities.
- The provision of liquidity via the LoLR should be as predictable as possible for the markets, other authorities involved in supervision or a potential restructuring, and the affected banks.
- There should be a good balance of costs and benefits for the banks and the SNB.

In the context of these measures, and owing to the interaction between the LoLR's facilities and the planned introduction of a PLB (the PLB becomes an option once the LoLR's facilities are exhausted), the definition of "sufficient collateral" in Article 9 paragraph 1 letter e NBA should be re-evaluated and if necessary made more precise (not least if specific legal obligations are also to be attached to it, see section 9.4.2). The idea that the term "sufficient collateral" means something different for emergency liquidity assistance than it does for ordinary money policy operations would appear to be undisputed.[165]

The aim is to ensure the timely provision of liquidity in the most effective and efficient way possible during an unfolding crisis, including against collateral that is less marketable and liquid. This involves a spectrum of liquidity facilities with which banks can obtain liquidity from the LoLR in a timely manner against a broad range of collateral.

Thus, according to Tucker, liquidity from the LoLR should initially be provided via ordinary facilities in which even less liquid collateral can be used.[166] Such a facility could be created by introducing new and adapting[167] existing facilities. This would mean that the actual ELA would be required only as a subsidiary to the ordinary facilities. Recourse to liquidity via ordinary facilities is usually on a "no questions asked" basis and is thus not linked to requirements in terms of accompanying measures.

The pros and cons of expanding the potential for liquidity provision via the LoLR should be carefully examined. Broader options for obtaining liquidity via SNB facilities could go some way towards alleviating the stigma problem, without eliminating it completely. An expansion can also create additional incentives for banks to prepare collateral. However, the early and widespread use of bank collateral under the SNB facilities carries disadvantages. Possible false incentives (moral hazard) should be taken into account because, in the event of high liquidity outflows caused by overly risky behaviour or poor decision-making by the bank, recourse to SNB facilities provides a kind of insurance. Thus, with such an arrangement it is important to define the boundaries and ensure that, even in a serious crisis involving possible restructuring

[165] SNB, Gutachten der SNB zur notenbankrechtlichen Zulässigkeit der Beteiligung der Schweizerischen Nationalbank am Massnahmenpaket zur Stärkung des Finanzsystems, 13 October 2008, p. 5

[166] Tucker expert opinion, pp. 70 and 93

[167] See Expert Group on Banking Stability 2023, Need for reform after the demise of Credit Suisse, 1 September 2023, p. 45 ff. and 55

measures, sufficient collateral eligible for central bank facilities is available in addition to the bank's own assets. The aim should be to use the PLB as sparingly as possible. As part of the strengthening of the LoLR potential, it should also be ensured that banks make advance legal and operational preparations for recourse to potentially substantial amounts under liquidity facilities (see section 9.4.2).

Moreover, any modifications to the responsibilities and powers in the area of financial stability that may arise from the PInC's review should be taken into account. The LoLR's tasks have implications for other authorities, and there are interdependencies between the authorities involved in a crisis.[168, 169]

9.4.2 Obligation for banks to prepare for using liquidity facilities[170]

In order that liquidity can be provided quickly in an emergency, comprehensive legal and operational preparations by the banks (e.g. to reserve collateral) are unavoidable. Banks must prepare the operational processes for using liquidity facilities in advance, test them regularly and take the necessary steps to put the bank's assets into a form that will allow them to be accepted by the SNB as sufficient collateral. The potential for obtaining liquidity can be considerably increased through corresponding preparation.

Thus, one measure to strengthen and better exploit the potential of the LoLR is to introduce a regulatory obligation to make such preparations, at least in the case of SIBs.[171] The Expert Group on Banking Stability argues that a regulatory framework should be drawn up to allow FINMA to instruct SIBs to reserve sufficient transferable and unencumbered collateral for the SNB and foreign central banks, and that this be held at the correct location in the group, in order to ensure access to additional liquid assets if needed.[172]

For example, as part of such an obligation, a minimum volume of collateral to be prepared could be specified, based on the short-term liabilities minus the amount of HQLA exceeding the regulatory liquidity requirement.

For a bank, the preparation of liquidity assistance comes at a cost – sometimes quite a considerable one. There must be a reasonable balance of costs and benefits for banks. This would have to be borne in mind when implementing new obligations. In addition, costs can be influenced by the design of the framework conditions.[173] Favourable conditions in the cantons, for instance for a coordinated mass change of creditor for registered promissory notes and conversion from paper to registered promissory notes, could reduce the costs of preparing mortgage-based ELA.

When introducing an obligation to make preparations, the banks' different business models must be taken into account – not every bank is active in the domestic mortgage business, for example. Likewise, when introducing regulatory obligations, greater predictability of the framework conditions for a facility and its possible use – for example under ordinary facilities – should be ensured.

It should additionally be borne in mind that the level of collateralisation also depends on the possibility to net out assets and liabilities at customer level. Moreover, assets can be pledged only once. For instance, imposing a minimum ELA volume could conflict with deposit insurance requirements. Under the Banking Act, 125% of privileged deposits must be covered with domestic assets. Collateral that is used to cover this requirement may not be simultaneously used for liquidity facilities.

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[168] Tucker expert opinion, p. 55

[169] See also chapter 17

[170] With regard to this possible measure, see Ammann et al., section 4.4.2, and Tucker expert opinion, p. 94, Recommendation 5

[171] In this regard, see also Group of Thirty (G30), Bank Failures and Contagion: Lender of Last Resort, Liquidity, and Risk Management, 9 January 2024, p. 10

[172] Expert Group on Banking Stability 2023, Need for reform after the demise of Credit Suisse, 1 September 2023, p. 55

[173] In their expert opinion, Ammann et al. discuss the establishment of the institutional and technical conditions to ensure that a larger proportion of high-quality but illiquid collateral is available for obtaining liquidity. Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 40

9.4.3 Expanding access to facilities of foreign central banks

A significant portion of UBS Group's assets are located abroad. Instead of preparing these assets for delivery to the SNB (e.g. securitised loans), they can also be delivered to foreign central banks, in accordance with the relevant foreign central bank's rules.

Incentives to prepare access to liquidity assistance via foreign central banks can be created by allowing the collateral for potential recourse to liquidity from foreign central banks to be at least partly offset against a new minimum ELA volume under certain circumstances.

Expanding access can increase the overall volume of liquidity assistance. Moreover, the direct provision of liquidity abroad increases flexibility in a crisis and directly targets the problem of a lack of transferability of liquidity between different legal entities within the group (local provision of business entities). Finally, the liquidity can be obtained directly in the corresponding foreign currency.

9.4.4 Reduction of the stigma problem

The problem discussed in section 9.3.3 regarding the stigma associated with ELA, and with liquidity assistance in a crisis in general, poses a significant and in principle unavoidable challenge for all central banks. Nonetheless, measures are conceivable which could at least alleviate the problem somewhat. This could prove to be useful, above all in cases which are less serious than the crisis of confidence at Credit Suisse.

The Expert Group on Banking Stability argues that, following the example of the Bank of England, a central bank should continuously make additional liquidity available and should try to make these operations as commonplace as possible.[174] Hence, the aim is that the market will no longer consider recourse to a facility to be anything out of the ordinary.

Possible recourse to liquidity via ordinary facilities could contribute to reducing stigma. As mentioned, operations should generally be made as commonplace as possible. However, this only applies if the liquidity problem is not due to fundamental business or organisational reasons, and can be resolved with liquidity assistance. In the event of fundamental problems, accompanying measures must be taken in consultation with other authorities. As the experience from abroad described above shows, discount window facilities are also used only very sparingly for example, and are associated with stigma.

The risks associated with disclosing liquidity assistance should be taken seriously. One possible measure is therefore to adjust the disclosure obligations. Tucker, for example, argues that recourse to ELA should be made public only if there is no expectation of negative consequences for the bank concerned.[175] This can create a larger window of time in which to tackle the cause of the liquidity outflows.

To enable the recourse to ELA to remain confidential for longer, there needs to be a corresponding legal basis in Switzerland, both for the SNB and for the banks (for both periodic reporting and ad hoc publication), as well as changes at international level. When adjusting the disclosure obligations, the advantages of such a rule will need to be weighed against the need for market transparency vis-à-vis investors. Another thing to bear in mind is the SNB's duty of accountability, although this could in principle still be ensured even with delayed reporting.[176]

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174 Expert Group on Banking Stability 2023, Need for reform after the demise of Credit Suisse, 1 September 2023, p. 48

175 Tucker expert opinion, p. 74

176 If the reporting rules for the SNB were changed, care would have to be taken to ensure, in particular, that the profit distribution to the cantons and the dividend decision of the General Meeting of Shareholders are based on the annual financial statements

9.4.5 Increased transferability of liquidity assistance within the banking group

Even if the parents of a G-SIB can strengthen their ELA potential, it is unlikely that this will be able to fully correct existing asymmetries within a G-SIB. A transfer of liquidity within the group can offset such imbalances to a certain extent, although, as discussed in section 9.3.4, there are limits to this in practice.

A conceivable measure to increase transferability is, in particular, the preparation of collateralised transactions between the legal entities. Some collateral is better suited for internal collateralisation than for external transactions (e.g. because of information asymmetries in the case of complex collateral, data protection and banking secrecy). This increases flexibility in a crisis. At the same time, the risk to counterparties within the group from collateralised internal transactions is limited.

9.4.6 Conclusion and proposed mix of measures regarding the three lines of defence in the area of liquidity

The corresponding discussion can be found in section 10.4.2.

10 Public liquidity backstop

10.1 Background

Switzerland does not have an explicit PLB which is enshrined in law. The PLB introduced under emergency legislation during the Credit Suisse crisis based on Article 184 paragraph 3 and Article 185 paragraph 3 of the Federal Constitution[177] (Cst.) successfully demonstrated how this instrument can contribute to instilling confidence during a bank liquidity crisis. The relevant international standard[178] provides for a PLB, and it is part of the third line of defence after the bank's own liquidity (first line of defence) and liquidity provision by the LoLR (second line of defence) have been exhausted. Despite the first two lines of defence, it cannot be ruled out that liquidity outflows will exceed the available collateral at a bank that is solvent in principle. It should be noted that the speed of the outflow, which has increased sharply in the digital environment, makes this far more likely. The PLB serves to strengthen the confidence of market participants ex ante in the successful continuation of a SIB. It can also, temporarily and under certain circumstances, provide the liquidity required to enable restructuring or bankruptcy liquidation in cases where the systemically important functions are continued.

On 6 September 2023, the Federal Council adopted a dispatch aimed at introducing a PLB for SIBs and supplementing the existing Swiss TBTF regime in line with the international recommendation.[179] The corresponding bill was being deliberated in the Federal Assembly at the time of publication of this report.

With the PLB, the SNB can grant a SIB in crisis a liquidity assistance loan with a federal default guarantee on a subsidiary basis (third line of defence) after the bank's own holdings of liquidity and its refinancing options on the market (first line of defence) and the option of other liquidity assistance from the SNB (second line of defence) have been exhausted. In addition to subsidiarity, granting a PLB is linked to other conditions: the introduction of a restructuring process, the bank's solvency, public interest and the proportionality of the state intervention.

There is no legal right to being granted a PLB. Since the liquidity required depends significantly on the SIB concerned, the crisis scenario and other measures to be taken, decisions are made on a case-by-case basis. The amount of the default guarantee is also determined on a case-by-case basis. To provide a default guarantee, the Federal Council submits the necessary guarantee credit for urgent debate to the parliamentary Finance Delegation.

The risk to the Confederation is offset in a number of ways:

– *Ex ante lump sum:* To offset the risk assumed by the Confederation through the potential granting of a default guarantee to the SNB, there is a provision for an ex ante lump sum to be paid by the SIBs to the general federal budget. At the same time, this should reduce competitive distortions between SIBs and non-SIBs. The ex ante lump sum is payable annually, regardless of whether a liquidity assistance loan with a federal default guarantee is granted.

– *Preferential rights in bankruptcy:* To reduce the risk of loss for the Confederation in the event of activation of the PLB instrument, a provision is made for preferential rights in bankruptcy for the SNB's claims from the liquidity assistance loan secured by the Confederation.

– *Premia, interest and costs for third-party services:* The Confederation will be entitled to a commitment premium on the default guarantee, and both the Confederation and the SNB will be entitled to a risk premium on the liquidity assistance loan with a default guarantee actually utilised. The SNB will also be compensated with interest for the loan costs it incurs. The amount of the premium will be determined on a case-by-case basis. Any costs for third-party services will be levied directly on the SIB.

To minimise false incentives from the provision of liquidity assistance loans by the SNB, the SIB will not only pay appropriate interest and premia during the use of the liquidity assistance loan with a default guarantee, but will also be subject to various conditions, namely:

– a ban on dividends and a ban on granting and repaying loans to the owners of the group holding company as well as on repayment of capital contributions.

[177] SR **101**

[178] FSB, Guiding Principles on the temporary funding needed to support the orderly resolution of a global systemically important bank ("G-SIB"), 18 August 2016

[179] BBl **2023** 2165

– a ban on taking actions that could delay or put at risk the repayment of liquidity assistance loans with a default guarantee.

Any breach of the conditions will result in consequences under criminal law.

Last but not least, undesirable behaviours are disincentivised with further measures in the area of remuneration. The recovery of variable compensation that has already been paid will be expressly possible in the future. In addition, FINMA can order comprehensive measures against bodies (e.g. replacement of board of directors and executive management).

The mere existence of the possibility to grant a PLB can have a preventive effect in the market and potentially prevent a bank run by depositors. The creation of this instrument can create confidence among investors and customers, and also contribute to them maintaining or establishing business relationships with the bank concerned, even in the event of a crisis. In the case of a G-SIB, the confidence of foreign regulatory authorities in its resolvability is also strengthened. This reduces the risk of foreign regulatory authorities ordering stricter regulatory requirements for legal entities of the G-SIBs domiciled in their country or limiting the transferability of capital and liquidity (ring-fencing). An explicitly regulated PLB can therefore help to prevent the actual need for its use through its mere existence.

The Federal Council's bill of 6 September 2023 also contains provisions that go beyond the introduction of the PLB concept according to the Federal Council's key parameters of 11 March 2022. These include the possibility for the SNB to grant additional liquidity assistance loans (ELA+). These loans served as a bridge during the critical phase until the granting of the liquidity assistance loan with a federal default guarantee (PLB). The validity period for granting ELA+ is restricted to 31 December 2027.

10.2 International comparison

10.2.1 Financial Stability Board

The Key Attributes[180] issued by the Financial Stability Board (FSB) set out key principles for effective bank resolution. The overarching goal is to enable a bank resolution – which, in the Swiss context, corresponds to restructuring or bankruptcy liquidation – without exposing taxpayers to losses. The Key Attributes also set out the principles of liquidity provision for a G-SIB in resolution.[181] In the Guiding Principles[182], the FSB specifies the principles regarding liquidity provision and in doing so introduces the concept of a PLB.

According to the Guiding Principles, the liquidity required in a resolution should be covered primarily by private sources of liquidity. The authorities would only provide liquidity after certain conditions were met and this would be kept as low as possible to minimise false incentives (moral hazard). The PLB should then be used, according to the Guiding Principles, where required and appropriate to implement the resolution strategy and thereby strengthen financial stability. It should promote market confidence and encourage private sector counterparties to continue providing liquidity to the bank during resolution. In addition, the PLB should have the credibility to cover the expected liquidity needs of the bank in resolution, enable the implementation of the resolution strategy preferred by the resolution authority and be sufficiently large to enable resolution of several G-SIBs at the same time. The liquidity should not be made available for longer than necessary to maintain the critical functions of systemic importance in an orderly wind-down, but nonetheless for a sufficient period until the bank regains access to private sources of liquidity.

The possibility of using a PLB is linked with moral hazard. The PLB can induce a bank to rely on liquidity provision through the PLB in the event of resolution, rather than making its own liquidity provisions for this. This risk of moral hazard must be minimised, for example through

[180] FSB Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014

[181] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, section 6

[182] FSB, Guiding Principles on the temporary funding needed to support the orderly resolution of a global systemically important bank ("G-SIB"), 18 August 2016

subsidiarity in the form of sufficiently strict liquidity requirements. The bank's liquidity needs must be covered primarily through private sources of liquidity. Financial incentives should therefore be put in place for a rapid exit from the PLB. In addition, losses to the public sector from the PLB should be avoided. Provision should therefore be made for ex ante or ex post mechanisms to offset any losses. The resolution authority creates a liquidity plan for the G-SIBs in its jurisdiction as an integral component of the resolution plan. In this liquidity plan, the liquidity needs in the event of resolution are estimated, and potential liquidity sources should be identified. Alongside funding via the private market and other access to central bank facilities, the availability of a PLB is considered to be a key element in securing sufficient liquidity.

10.2.2 European Union

The Single Resolution Board (SRB) is the central resolution authority within the European Banking Union. Together with the national resolution authorities, it forms the Single Resolution Mechanism (SRM). The Single Resolution Fund (SRF), from which all banks of the European Banking Union are eligible to access special liquidity assistance in the event of resolution, is part of this. The SRF ensures effective application of resolution measures. It can be used both for liquidity assistance and for capital measures (granting loans or purchasing assets).

The SRF is funded by ex ante contributions by the banks from the 21 member states of the Banking Union, and was built up between 2016 and 2023.[183] At the end of 2023, the target level of at least 1% of covered deposits of credit institutions in all Banking Union member states was reached. The SRB generally provides liquidity assistance against collateral. Within the Banking Union, the European Stability Mechanism (ESM) fulfils the role of common backstop. Where the resources of the SRF are insufficient, funds under the ESM can be called upon. This roughly doubles the size of the SRF.

10.2.3 United Kingdom

In the United Kingdom, the Resolution Liquidity Framework of the Bank of England (BoE) can provide liquidity to banks in a BoE-led resolution, if required. This is a PLB in the form of liquidity assistance by the central bank. Activation must be approved in advance by HM Treasury. Liquidity assistance under the Resolution Liquidity Framework is generally provided against collateral. Due to the presumed extent of the liquidity support, the BoE also requires an indemnity from HM Treasury. This puts the BoE in the position of providing a bank in resolution with as much liquidity as necessary for as long as required. Any losses from the liquidity assistance are borne by the sector.

10.2.4 United States

In the USA, large and complex financial institutions may be provided with liquidity via an Orderly Resolution Fund (OLF) by a bridge bank established under the strategy of the Federal Deposit Insurance Corporation (FDIC). The OLF is a fund based at the US Treasury from which the FDIC can borrow the liquidity required for a resolution. Technically, the FDIC either gives a guarantee to a private liquidity provider (guarantee covered by the possibility of access to the OLF) or issues bonds (covered by the assets of the bridge bank it establishes) that are purchased by the US Treasury. The OLF's funds are limited – a maximum of 10% of the consolidated assets in the first 30 days and up to 90% thereafter if the Secretary of the Treasury and the resolution authorities have agreed on a repayment plan over a maximum of 60 months. The FDIC can only make use of funds from the OLF subject to very strict conditions. The fund is not pre-financed and is therefore not an ex ante fund. Claims from the OLF are given preferential treatment to those of private creditors in the creditor hierarchy. The funds drawn from the OLF must be fully repaid from the proceeds of the sale of the assets of the bridge bank. In the event of a loss, certain financial institutions may be called upon to make the repayment for a period of five years.

[183] See the information about the SRF on the SRB's website, available at: https://www.srb.europa.eu/en/single-resolution-fund

10.3 Assessment

10.3.1 Need for a PLB to be anchored in law

The case of Credit Suisse has shown that the existing first and second-line defence instruments were insufficient to cover the liquidity outflow. Through the possibility created under emergency measures of additional liquidity assistance loans from the SNB (ELA+) and liquidity assistance loans with a federal default guarantee (PLB), it was ensured that Credit Suisse did not become illiquid. The liquidity assistance loans bought time and ensured the continuation of Credit Suisse's business activities so that these could be continued in an orderly manner until the definitive takeover by UBS and to prevent any risk to systemically important functions. Following the takeover of Credit Suisse by UBS, on 11 August 2023 both the agreement on the federal loss protection guarantee and the agreement with the SNB on the public liquidity backstop were definitively terminated. The Confederation therefore did not have to absorb any losses and earned income of some CHF 200 million from the guarantees.

In the case of Credit Suisse, the PLB helped to avert major damage to the Swiss economy and the Swiss financial system. Its benefits are thus proven and underline the need for the PLB instrument to be anchored in law. The importance of an explicit PLB is also emphasised in the report of the Expert Group on Banking Stability[184] and in the Tucker expert opinion[185].

In the event that the PLB bill approved by the Federal Council is rejected by parliament, the Expert Group on Banking Stability recommends the introduction of a central bank liquidity backstop (CBLB).[186] This is a liquidity assistance loan from the SNB without bank collateral and without a state default guarantee. Due to the lack of bank collateral, the SNB's loss risk would not be covered. The Expert Group on Banking Stability considers there to be little difference between a CBLB and a PLB from an economic perspective, as both instruments constitute uncollateralised SNB loans. While the SNB receives a federal default guarantee with a PLB, there is no such guarantee with the CBLB. However, the economic risk in both cases is borne by the state, i.e. either the Confederation or the SNB, making the two instruments equivalent from an economic perspective.

However, there are significant differences between the PLB and the CBLB from a regulatory policy perspective. While parliament maintains budgetary sovereignty with the PLB and can take on a monitoring function, the CBLB evades this monitoring by parliament due to the SNB's constitutional independence. The SNB would also run financial risks with the provision of unsecured liquidity, and the line between liquidity assistance and solvency support would become blurred. In crisis situations, the independence of the SNB and its monetary policy would be affected, and in the event of a loss, its credibility and options for action would be at risk. Pursuit of a CBLB approach is therefore not recommended. The Expert Group on Banking Stability considers the CBLB to be a feasible variant but prefers the PLB.

10.3.2 Banking circle to be covered

The Silicon Valley Bank, Signature Bank and First Republic Bank crises in the USA in spring 2023 demonstrated that under certain circumstances, the failure of non-systemically important banks can also jeopardise financial stability. This poses the question of whether situations could also arise in Switzerland in which a PLB extended to non-systemically important banks could contribute to financial stability, and whether the PLB should be extended for such situations.

The Federal Council provides for the introduction of a PLB in the bill of 6 September 2023. The justification for its restriction to SIBs is that the failure of these banks can cause significant turmoil in the financial system and considerable damage to the economy (see section 2.2). A potential extension of the PLB to non-systemically important banks, and thus an expansion of the definition of systemic importance, are not recommended by the Federal Council.[187] Situations in which an extension may contribute to financial stability are conceivable. Such a situation could occur in Switzerland, for example if several non-systemically important banks become distressed at the same time, and the cumulative effect takes on significant proportions. However, lower benefits along with higher costs should be assumed compared to the introduction of a PLB for SIBs:

[184] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, pp. 51 and 77

[185] Tucker expert opinion, p. 71

[186] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, pp. 51 and 52

[187] In a similar vein, see Brunetti summary expert opinion

- Non-systemically important banks entail lower risks for financial stability versus SIBs, due to their smaller size and degree of interconnectedness with the financial system and the greater substitutability of the services provided.

- From a regulatory perspective, the stability of all banks in Switzerland is already supported with the Basel III rules, which relate to the entire banking sector in contrast to international application. The implementation of Final Basel III was approved by the Federal Council on 29 November 2023.[188] The focus of national implementation is that risky areas in banking must be secured by more capital. This reduces the vulnerability to crises of all banks and, in the event of a crisis, the potential extent of damage to the financial system and the economy. In addition, FINMA's risk-oriented surveillance takes the different sizes, business models and risks of the individual institutions into account.

- The potential for liquidity provision via the SNB as a LoLR also plays a key role in assessing the benefits of extending the PLB. In September 2023, the SNB announced that it was expanding liquidity provision options for the banking sector.[189] In future, it will be able to provide liquidity to all banks against mortgages as collateral. This will give non-systemically important banks the possibility of improving their liquidity levels in a crisis even without a PLB.

- The option of recourse to a PLB involves additional costs for banks. To compensate for the Confederation's risk in granting any PLB, non-systemically important banks would also have to pay lump-sum compensation. In addition, the PLB proposed by the Federal Council is conceived as part of the TBTF regime. This means that all PLB-eligible banks must meet stricter regulatory requirements as regards capital, liquidity and resolvability. An extension of these requirements to non-systemically important banks would be necessary to reduce the risk for the Confederation, but would run counter to the basic idea of proportionality in the regulations.

- Competitive distortions between SIBs with access to the PLB and the remaining banks should be remedied not by extending the PLB but by the envisaged appropriate ex ante lump sum from SIBs (see 10.3.4).[190]

Overall, the Federal Council does not consider an extension of the PLB to non-systemically important banks to be expedient. A PLB should only be considered when required in the public interest and for financial market stability. For an extension (including a limited one) of the PLB, the Federal Council questions whether there is sufficient public interest as an objective justification. This would be imperative to legitimise the resulting intervention in the right to equal treatment (Art. 8 Cst.) and economic freedom (Art. 27 in conjunction with Art. 94 Cst.). As stated in the dispatch on the PLB, the intended restriction to the criterion of systemic importance is objectively justified.[191]

10.3.3 Restructuring as a prerequisite

According to Article 4 of the emergency ordinance of 16 March 2023, liquidity assistance loans with a federal default guarantee would have to be "appropriate and necessary for the continuation of the borrower's business activity". They could therefore be granted outside a restructuring. By contrast, Article 32*a* Draft BankA in the bill of 6 September 2023 envisages that FINMA will have introduced a restructuring process or that one will be forthcoming as a precondition for issuing this type of loan. In a similar future case, based on the bill of 6 September 2023, the approach taken in March 2023 would no longer be possible. The restriction to the need for restructuring is reasonable because this condition is in line both with the international standard and the PLB parameters approved by the Federal Council in March 2022. In addition, state support measures during a restructuring can be better managed and monitored.

188 AS **2024** 13
189 SNB, Introductory remarks, news conference, 21 September 2023
190 Brunetti summary expert opinion, chapter 1
191 BBl **2023** 2165, p. 78 ff.

10.3.4 Competitive distortions

Studies show that SIBs worldwide benefit from an implicit state guarantee due to their TBTF status.[192] As it is assumed that SIBs can rely on state support in the event of a crisis, they also have, for example, a better rating and lower borrowing costs. There are major discrepancies between estimates of the amount of this "TBTF subsidy". For example, the International Monetary Fund (IMF) concludes in a study that, depending on the estimation method, the value of the implicit state guarantee for G-SIBs in Switzerland is between CHF 5 billion and CHF 18 billion per year (ratings-based approach) and up to CHF 45 billion per year (contingent claims analysis approach).[193] The value of the TBTF subsidy fluctuates over time and is highest during periods of considerable uncertainty, when state support is most likely. However, other studies reach lower values. For example, a study by the Boston Consulting Group estimated the aggregated value for both Swiss SIBs in 2010 at between CHF 2.3 billion and CHF 3.4 billion per year.[194] These studies show that it is not possible to quantify the precise amount of the TBTF subsidy from an implicit state guarantee.

To offset potential advantages from an implicit state guarantee and to reduce risks with a view to financial stability, SIBs must meet stricter regulatory requirements regarding liquidity, capital and resolvability compared to non-systemically important banks. The value of the TBTF subsidy may increase further due to the explicit anchoring of the PLB in law. This may result in a competition-distorting effect in favour of SIBs even before utilising a PLB. It can be concluded from the studies mentioned above that a precise quantification of competitive distortion originating from a PLB is not possible.

In the bill of 6 September 2023, the Federal Council provided for ex ante lump-sum compensation. This should take into account the loss risk from the federal default guarantee over the long-term average and offset a resulting competitive advantage for SIBs through the introduction of a PLB. The lump-sum compensation has been designed to be risk-based, so that the risk of the SIBs' different business models and in particular the liquidity available are taken into account. Lump-sum compensation would have resulted in total costs of around CHF 70–210 million for 2022 across all SIBs.[195] Excluding the special loss by Credit Suisse in 2022, this corresponds to around 0.6–1.8% of the total of all pre-tax consolidated profits generated by the SIBs in 2022.[196]

Using lump-sum compensation to fully offset the implicit state guarantee resulting from the above-mentioned international studies is not appropriate. Firstly, because passing on the sums mentioned above, running into billions, to only four SIBs is not really conceivable without a significant negative impact on the economy. Secondly, because the introduction of lump-sum compensation must not be allowed to turn into a competitive disadvantage. SIBs already have to meet stricter regulatory requirements than non-systemically important banks and pay additional premiums and interest if they actually utilise a PLB. Lastly, SIBs have no legal right to granting of the PLB. The competition-distorting value of the implicit state guarantee should primarily be countered via an appropriate regulatory framework. In addition to the lump-sum compensation, it is therefore paramount that the regulatory efforts ensure the resilience of SIBs and appropriate resolution measures to avoid the use of tax revenues as far as possible in the event of a banking crisis (see also section 13.4.4). A study by the IMF indicates that preventive regulatory measures are appropriate for reducing the value of state subsidisation of SIBs.[197]

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[192] See, for example, the following studies: Allenspach, Reichmann and Rodriguez-Martin, Are Banks still "Too Big to Fail"? - A market perspective, SNB Working Paper 18/2021, October 2021; IMF, Moving from Liquidity- to Growth-Driven Markets, Global Financial Stability Report, April 2014, pp. 101-132

[193] IMF, Moving from Liquidity- to Growth-Driven Markets, Global Financial Stability Report, April 2014, pp. 114 and 118

[194] Boston Consulting Group, "Too big to fail": Value of Implicit Government Guarantee in Europe. Study cited in BBI **2011** 4717, p. 4788

[195] The lower value in the cost range results from an assessment rate of 0.005% of the assessment base defined in Art. 32*c* Draft BankA; the upper value is based on an assessment rate of 0.015%

[196] The case of ZKB is interesting as a comparison, because it is a SIB and it has a state guarantee. ZKB paid around 2.7% per year of its profits (average CHF 24 million per year) to the canton of Zurich for its state guarantee between 2017 and 2022. For the following reasons, it appears reasonable and logical that the lump sum for the option of recourse to a PLB is set lower than the compensation for cantonal state guarantees. Unlike cantonal banks with state guarantees, SIBs will have no legal right to granting of the PLB. SIBs must also pay additional premiums and interest if they actually utilise a PLB. Unlike a cantonal guarantee, the PLB also does not necessarily cover all customer deposits at the bank concerned. In addition, SIBs already have to meet stricter regulatory requirements regarding liquidity, capital and resolvability compared to the other (cantonal) banks

[197] IMF, Moving from Liquidity- to Growth-Driven Markets, Global Financial Stability Report, April 2014, p. 125

Due to insufficient publicly available data, no quantitively reliable comparison with the compensation levied in foreign jurisdictions can be made. A full comparison should also be treated with caution because the country-specific forms of compensation should be classified within and considered in relation to the framework of the national bank taxation concept (see bank levy structured as a tax in the UK).[198]

10.3.5 Compensation: ex ante lump sum vs. ex post remuneration

According to international standards, losses to the public sector from the PLB should be avoided. Public liquidity backstop concepts should therefore include ex ante or ex post mechanisms to offset any losses.[199] While in the case of an ex ante mechanism, the lump-sum compensation must be paid by the bank concerned irrespective of whether or not there is a crisis, in the case of ex post remuneration, the compensation is only due if there is still a loss for the public sector following the completion of bankruptcy proceedings for the bank concerned. The ex post remuneration would be levied on the remaining banks, i.e. not on the bank that caused the losses, as it is in the process of being liquidated.

An ex ante lump sum takes into account the basic willingness of the Confederation to provide a SIB with a default guarantee for a liquidity assistance loan from the SNB in the event of a crisis at the SIB and subject to fulfilment of the legally stipulated conditions, and to run the risk of a certain amount of losses in order to ensure financial stability. This basic willingness of the Confederation is already effective before an actual crisis occurs and has a corresponding value for all SIBs. It can be assumed that customer and investor confidence in the bank will be strengthened and that they will be prepared to maintain or enter into business relationships with the bank concerned, even during a crisis. This may also prevent a run on the bank by depositors. It can be expected that a SIB will enjoy a discount on its borrowing costs in the market, owing to the existence of the PLB instrument and its confidence-building effect. These aspects result in a competitive distortion in favour of SIBs. It therefore also seems justified that this distortion is offset by the SIBs by means of an appropriate lump sum paid by them to the general federal budget, irrespective of whether a liquidity assistance loan with a default guarantee is granted. Private companies should not be able to profit from the willingness of the Confederation to take on risk without compensation.

The bill of 6 September 2023 includes ex ante compensation to be paid by the SIBs to the general federal budget. The risk-based form of the lump sum should lead SIBs to reduce liquidity risks and moral hazard.[200] The risk inherent in the SIBs' different business models, and in particular the liquidity available, should be taken into account. SIBs that have more eligible capital and a lot of liquidity are less likely to utilise a default guarantee and should therefore have to pay a lower lump sum.

The PLB concept could also include a repayment of the remaining public sector loss following the bankruptcy proceedings via ex post remuneration. However, the Federal Council does not consider this to be expedient. The legal feasibility of such remuneration is questionable, as there is no constitutional basis for implementation in the form of a levy, at least insofar as it would be classified as a tax. In addition, this measure would breach the costs-by-cause principle, because the costs would not be paid by the bank causing the damage. Such a solution would not take into account the basic competitive advantage of SIBs over non-systemically important banks arising from the option of recourse to a PLB either. The ex post remuneration solution is widespread internationally (e.g. in the USA, the UK and the EU). Unlike in Switzerland, however, the potential possible lump sum is generally shared between a larger number of banks.

10.3.6 Preferential rights in bankruptcy

Preferential rights in bankruptcy are a core element of the bill. Under Article 219 paragraph 4 of the Federal Act of 11 April 1889[201] on Debt Collection and Bankruptcy (DEBA), any claims of the SNB from liquidity assistance loans with a federal default guarantee are considered third-class claims after claims privileged under bankruptcy law from the first and second creditor classes (e.g. employee salaries, social insurance contributions or privileged deposits under Art. 37*a* BankA). Within the third class, before PLB claims are satisfied, priority must be

[198] HM Treasury, Bank levy – changes to the scope and administration, website

[199] FSB, Guiding Principles on the temporary funding needed to support the orderly resolution of a global systemically important bank (G-SIB), 18 August 2016, section 4

[200] To offset the risk to the Confederation and SNB and moral hazard from the granting of a PLB, the SIB should, according to section 10.3.7, also pay appropriate interest and premiums and be subject to various conditions while the PLB is being utilised

[201] SR **281.1**

given to settling claims from vested benefits accounts in the form of pure savings solutions and savings in linked individual provident measures (pillar 3a) that exceed the share of privileged deposits of CHF 100,000. All other third-class claims are subordinate to PLB claims.

Preferential rights in bankruptcy for the SNB, arising from liquidity assistance loans with a default guarantee within the third class of Article 219 paragraph 4 DEBA, do not have a negative impact on deposit insurance but may reduce the share of satisfied claims from other third-class creditors in bankruptcy proceedings. However, as supporting the SIB with PLB liquidity significantly helps the successful restructuring of the bank and should ultimately result in averting bankruptcy in most cases, a PLB – and the privileged treatment it requires – is in the interests of all creditors.

10.3.7 Borrower's obligations

The prospect of liquidity assistance loans with a default guarantee being granted can lead to false incentives (moral hazard). Moral hazard can result in irresponsible behaviour by the bank, contrary to the public interest, and thus trigger new risks or exacerbate existing ones. To minimise moral hazard from the provision of liquidity assistance loans by the SNB, in addition to paying appropriate interest and premiums, the SIB will be subject to various conditions during the use of the liquidity assistance loan with a default guarantee. The bill includes a ban on dividends and a ban on granting and repaying loans to the owners of the group holding company, as well as on repayment of capital contributions. In addition, the SIB will be subject to a ban on taking actions that could delay or put at risk the repayment of liquidity assistance loans with a default guarantee. It is envisaged that a breach of the conditions will result in consequences under criminal law. In this way, the intended measures have an even stronger disciplinary character to reduce moral hazard.

10.4 Possible measures

10.4.1 PLB for SIBs in ordinary law

The need and expediency of enshrining the PLB instrument for SIBs in ordinary law was demonstrated by the Credit Suisse crisis. The PLB should therefore be anchored in law as a possible measure. The Federal Council approved a corresponding dispatch to Parliament on 6 September 2023.

10.4.2 Conclusion and proposed mix of measures regarding the three lines of defence in the area of liquidity

Although the measures taken since the 2007–08 financial crisis have strengthened the liquidity of banks considerably, which also had a positive impact for a long period in the Credit Suisse crisis, there is a need for action as regards liquidity levels. Liquidity outflows at Credit Suisse were on a previously unprecedented scale. Due not least to the developments in digital banking and the rapid spread of information, the arrangements for ensuring liquidity must also adapt to such extreme scenarios in the future.

As it would be neither tenable from a business point of view nor make economic sense to issue liquidity requirements for each SIB or bank to guarantee the bank's liquidity in the event of any conceivable run, all three lines of defence for ensuring liquidity must be strengthened. The following liquidity-related mix of measures is shown in the chronological order of their use in a crisis.

- **Liquidity requirements** (first line of defence): The implementation of the recently revised LiqO already takes into account the considerable need for action with regard to the special liquidity requirements for SIBs and results in significantly stricter and, in an international comparison, high liquidity requirements for SIBs. Any uncovered liquidity risks can be sufficiently offset with the institution-specific additional requirements already envisaged for SIBs in the LiqO. Any further adjustment of the liquidity requirements for SIBs should therefore be avoided, in view of the fact that the effectiveness of the new provisions for SIBs has to be reviewed by the end of 2026, as required by the LiqO.

In light of recent experience, however, the globally applicable ratios and requirements of the liquidity regulations for all banks, the LCR and the NSFR, must be reviewed and adjusted if necessary. As a standardised calculation of these ratios is important for international comparability and a level playing field, the relevant changes in this regard should be coordinated internationally. The following must be checked in particular in the LCR: the outflow factors, strengthening of the buffer function, the treatment of liquidity requirements in foreign entities, thresholds to limit individual short-term funding sources, and the introduction of a regulatory floor for compliance with the LCR in key foreign currencies. By contrast, with regard to the NSFR, certain weighting factors in particular must be reviewed.

Since timely, high-quality reliable data is paramount for early detection and management of a liquidity crisis, further specification of requirements for the provision of liquidity information by the banks is also recommended for rapid implementation in the liquidity regulations. The introduction of regulatory withdrawal restrictions for deposits to reduce outflows in a crisis must be avoided as this would be an excessive intervention into the business model of the banks and the withdrawal options of bank customers. To facilitate the diversification of funding sources, the question of whether the introduction of a covered bonds act would be appropriate and expedient must be examined, taking account of, in particular, the existing Mortgage Bond Act, the measures relating to the LoLR function and the planned PLB.

- **Lender of last resort** (second line of defence): The existing legal basis and framework conditions must be reviewed as part of the implementation of postulate 23.3445 “Review of the SNB’s toolkit”, specified in greater detail and refined as necessary. The aim is to expand the potential of liquidity provision in a crisis through the LoLR by utilising both ordinary and emergency facilities. Alongside the constitutional mandate of the SNB and the knowledge gained from the Credit Suisse crisis, the interactions resulting from introducing a PLB, the introduction of new or adjustment of existing facilities and potential adjustments to the institutional framework resulting from the findings of the PInC must be taken into account. Part of strengthening the LoLR regime is also a regulatory obligation for banks to prepare collateral, whereby the business model of banks and a good cost-benefit ratio and plannability must be taken into consideration when implementing such a requirement.

  Furthermore, options for reducing the stigma issue and for increased transferability of liquidity assistance within a banking group must be examined. Banks should also expand access to facilities of foreign central banks as far as possible.

- **Public liquidity backstop** (third line of defence): In future, a third line of defence should be available to SIBs in ordinary law in the form of the PLB. Here, recourse to the PLB should only be possible during restructuring, and should be compensated by the SIBs by means of an ex ante lump sum. To reduce the risk to the Confederation, the PLB should include preferential rights in bankruptcy proceedings for claims by the SNB. To reduce moral hazard, SIBs will have to pay appropriate interest and premiums, and will be subject to further conditions if a PLB is utilised.

  This measure has already been submitted to Parliament with the dispatch of 6 September 2023. An extension of the PLB to non-systemically important banks is not considered to be expedient because, among other reasons, in the view of the Federal Council there would not be sufficient public interest as an objective justification. No measures that go beyond the bill on the PLB have been identified.

11 Depositor protection

11.1 Background

The system of depositor protection[202] has two basic objectives. First, it should contribute to the stability of the financial system by strengthening depositors' confidence in the security of their bank deposits and thus reducing incentives for a bank run during a crisis. Second, they should protect depositors against losses or temporary non-availability of their deposits in the event of a bank failure.

Depositor protection in Switzerland follows a three-stage approach. In the first stage, privileged deposits are immediately paid out in full or pro rata from the bank's liquidity, i.e. outside the ordinary liquidation procedure. Under the Banking Act, 125% of privileged deposits must be covered by domestic assets to this end. Privileged deposits are deposits held at the Swiss and foreign branches of Swiss banks up to a maximum of CHF 100,000 per privileged depositor (Art. 37*a* BankA, Art. 42*c* BankO). The system is triggered by bankruptcy or specific protective measures by FINMA.

If the bank's liquidity is insufficient for an immediate payout of the privileged deposits, deposit insurance is triggered in a second stage. This ensures payout of those privileged deposits that are held at Swiss branches and that are not retirement assets (known as secured deposits).[203]

Deposit insurance is performed by the banks as a type of self-regulation (esisuisse) and funded by bank contributions when utilised. FINMA informs esisuisse of the required amount for the payout; esisuisse then makes this amount available within seven days of receiving the notification from the agent appointed by FINMA to carry out the investigation, restructuring or bankruptcy liquidation. This agent draws up a payment plan, requests payment instructions immediately from the depositors listed in the payment plan for payout of the secured deposits, and triggers payment of the (remaining) portion of privileged deposits held at Swiss branches on the seventh working day after receiving the instructions at the latest.

The contribution from esisuisse is subject to a cap. This cap is 1.6% of the total of all secured deposits and at least CHF 6 billion. As at the end of 2022, the cap was CHF 8 billion. esisuisse must provide the sum required within seven days.

The third stage is preferential rights in bankruptcy proceedings for those privileged deposits that cannot be paid out in the previous two stages. Preferential rights in bankruptcy proceedings mean that these deposits are assigned to the second class of creditors in the ordinary liquidation procedure. They are therefore favoured over creditors in the third class, e.g. bondholders. These deposits are paid out in one or more advance distributions or only after completion of the liquidation procedure, and can therefore involve delays or losses for the depositor.

In addition, individual cantonal banks also have a state guarantee (limited or unlimited), which further contributes to the deposit protection for these banks.

11.2 International comparison of deposit insurance

11.2.1 European Union

In the EU, the member states have their own deposit insurance schemes, which are subject to Directive 2014/49/EU.[204] This Directive includes regulations and requirements concerning the national deposit insurance schemes and thereby aims to achieve a certain degree of harmonisation between the member states. The individual limit is EUR 100,000 per depositor and credit institution; in addition, from 2024 the payout must be made within seven working days. Funding of the member states' deposit insurance schemes must be at least 70% ex ante, with a coverage ratio of 0.8% of the secured deposits of its member institutions. If the funds for deposit insurance are insufficient, the deposit insurance scheme must have adequate alternative funding arrangements.

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[202] In this chapter, a distinction is made between depositor protection and deposit insurance. Deposit insurance refers to the tasks of esisuisse, i.e. the provision of funds to pay out insured deposits in a crisis. Depositor protection encompasses deposit insurance but is a much broader concept. Among other things, it also covers FINMA's activities in paying out insured deposits and bankruptcy proceedings with regard to depositors (especially preferential rights in bankruptcy).

[203] The following balances of Swiss banks in Switzerland and abroad are privileged: personal and salary accounts, savings and investment accounts, current accounts, vested benefit and retirement savings accounts, and balances held at foreign branches. Secured deposits are a subset of privileged deposits and are limited to personal and salary accounts, savings and investment accounts, and current accounts that are held at Swiss branches

[204] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ of 12 June 2014, p. 149

11.2.2 United States

In the USA, deposit insurance is performed by the Federal Deposit Insurance Corporation (FDIC). The FDIC insures deposits, supervises financial institutions and has authority in the area of restructuring and resolution of financial institutions.

The individual limit for secured deposits is USD 250,000 per customer, account category and member institution. The FDIC has a Deposit Insurance Fund, which is funded by risk-based premiums from the banks. As at the end of 2022, this totalled USD 123 billion. This corresponds to a coverage ratio of around 1.3% for aggregated secured deposits of USD 9,900 billion. In the long term, the FDIC is aiming for a coverage ratio of 2.0%. The FDIC has a comprehensive guarantee (full faith and credit) from the US government, should the Fund's liquid assets prove insufficient. The FDIC can take a broad range of measures to avert systemic risk (systemic risk exception). This is how it was able to guarantee all Silicon Valley Bank deposits in March 2023. During the 2007-08 financial crisis, it also guaranteed Wachovia investments of USD 312 billion, for example, to enable its acquisition by Citigroup.

11.3 Assessment

Deposit insurance offers increased protection in bankruptcy proceedings to depositors at banks and investment firms holding accounts that are licensed by FINMA. Deposit insurance therefore strengthens confidence in bank deposits during crises and contributes to financial stability.

The current scheme has various limitations and thus weaknesses, which are detailed below.

11.3.1 Scheme cap

With the current cap, the deposit insurance scheme would probably not be in a position to manage the collapse of one large or several medium-sized or smaller banks. As at the end of 2022, 11 banks each had secured deposits totalling more than CHF 8 billion. Individually, SIBs' secured deposits were between 4 and 13 times higher than the cap.

If the funds of the deposit insurance are insufficient to fully pay out secured deposits in the event of a bankruptcy, the secured deposits that are not paid out have preferential rights in bankruptcy proceedings and will be allocated to the bank's bankruptcy estate. The depositor is therefore exposed to a loss risk and access to this part of the deposit may be blocked for a longer period.

The scheme's current cap and the lack of regulation for secured deposits above this limit may adversely affect the credibility of the deposit insurance. It may cause doubt among depositors that it would actually be possible to pay out their assets up to the individual limit of CHF 100,000. This weakness is therefore particularly pronounced in the case of SIBs as their secured deposits are several times higher than the cap.

11.3.2 Ex post funding

The Swiss deposit insurance scheme is funded ex post, i.e. the contributions to secure deposits are only levied after a use case occurs. This may further exacerbate a potential existing lack of liquidity at banks that have to make a contribution. If the contributions also have to be written down, the banks will suffer additional losses. This can lead to a chain reaction and drive further banks into illiquidity or insolvency. Ex post funding thus creates a procyclical effect which can exacerbate a crisis and thus have a negative impact on system stability.

11.3.3 Payout period

The payout period in the current scheme is a maximum of 14 days. This period includes a period of seven days for esisuisse to collect the funds from its member banks or arrange to recover the deposited assets. esisuisse then transfers the funds to the bankruptcy administrator, which then has a period of seven days to pay out the funds received to the depositors.

According to the international standard[205], the maximum payout period should be seven days. The Silicon Valley Bank crisis in the USA showed that even seven days may be too long, which is why the FDIC guaranteed a next-day payout in March 2023.

The rather long payout period of the Swiss scheme is attributable to the ex post funding combined with a complex payout procedure.

[205] International Association of Deposit Insurers, IADI Core Principles for Effective Deposit Insurance Systems, November 2014

11.3.4 Contribution to crisis management

Swiss deposit insurance is only activated when the availability of the secured deposits is restricted due to bankruptcy or certain protective measures by FINMA. The role of the deposit insurance scheme is then limited exclusively to providing the funds to pay out the secured deposits. However, in the case of a SIB, the interruption in availability of secured deposits in a crisis is not an option because the domestic deposit business, as a systemically important function, must be continued over a certain period of time. Unlike the other banks, SIBs therefore also do not have to take any preparatory actions (Art. 42*h* BankA) to ensure the payment plan is created, depositors are contacted and the payout is made. However, they must draw up a concept that demonstrates how payout can take place if restructuring fails. Thus, in accordance with the TBTF objective, which is to maintain economically important functions, recourse to deposit insurance in the event of a crisis at a SIB is extremely unlikely.

11.3.5 Individual limit of CHF 100,000

Depositors' continued access to their deposits and ability to make payments must be ensured, even in the event of a crisis. At the same time, the limit on the secured deposits should maintain market discipline. The limit of CHF 100,000 applies equally to all customers. However, there are considerable differences between the various customer segments in reality. Thus corporate customers typically have significantly greater balances, for example to make salary payments or purchase assets. As a large part of these balances is not covered by the deposit insurance, there is a greater incentive for companies to withdraw funds quickly in the event of a crisis. This was clearly demonstrated by the cases of Silicon Valley Bank and Signature Bank in the USA in March 2023.

Wealth management customers also typically have significantly higher deposits and react more sensitively to negative headlines regarding a bank's stability. For example, Credit Suisse reported that it had lost CHF 61 billion of its assets under management (AuM) at group level in the first quarter of 2023. Of this figure, CHF 47 billion or 5% of AuM were in wealth management, and only CHF 5 billion or 1% of AuM were in the Swiss entity. The majority of outflows were due to deposit withdrawals.

11.4 Possible measures

The following chapters discuss the range of possible measures in the area of the deposit insurance scheme. These can be assessed taking into account their individual advantages and disadvantages. Due to their interdependencies, the measures in the subject area are assessed together as a whole. Accordingly, section 11.4.7 presents conclusions.

11.4.1 Introduction

In the case of a systemically important bank, the interruption in availability of secured deposits is not an option in a crisis, because these functions must be continued over a certain period of time. A sufficiently equipped PLB can, if needed, ensure the uninterrupted payout of the deposits. For SIBs, deposit insurance in its current form can therefore only make a subsidiary contribution to preventing a bank run if depositors doubt the continuation of functions of systemic importance. The primary role of deposit insurance in the TBTF context would be maintaining the confidence of customers in a bank.

The primary objective of the TBTF regime in a crisis is to ensure the continuation of systemically important functions as far as possible without state aid. However, the assessment above also indicates that there are weaknesses in the deposit insurance scheme as regards non-systemically important banks. It should be noted that these weaknesses and the relevant measures were already known at the time of the revision of the BankA regarding deposit insurance and insolvency, but were not implemented by the legislator in 2021.

11.4.2 State aid for deposit insurance

The banks' contribution obligation is limited to 1.6% of the total secured deposits. If this amount is insufficient when the deposit insurance is used, there will only be a pro rata payout, whereby the secured amount of CHF 100,000 may be significantly reduced. This is principally an issue with SIBs, or in the event that the insurance is used at several banks at the same time. The Federal Council can adjust the requirements of the contribution obligation if circumstances require it (Art. 37*h*, para. 5 BankA). On this basis, it will not be easy to implement a

short-term increase in the contribution obligation when the insurance is used, and this would increase the existing procyclicality of the scheme. The introduction of state aid with corresponding risk-based compensation is being discussed in this regard. This corresponds to international standards and the recommendations of the IMF.[206]

Currently, CHF 504 billion is required to protect all secured deposits. The corresponding guarantee would in any case have to be compensated ex ante and based on risk by the banks. This type of guarantee then raises a variety of questions: Firstly, it would not be in line with the third TBTF objective of avoiding state aid. Secondly, this type of guarantee may not be sufficient to restore confidence in the bank concerned, in particular since only secured deposits would be protected. Further measures would be necessary, including parallel use of a PLB.

11.4.3 Shorter payout period

With regard to SIBs, a sufficiently equipped PLB may offer better protection against a bank run than the deposit insurance scheme as it can ensure uninterrupted payout of deposits. Even a significantly shorter payout period for the deposit insurance would not produce a comparable calming effect on depositors.

11.4.4 Increase in the individual limit

The individual limit may incentivise certain investors to rapidly withdraw their entire deposits or the share exceeding the limit in the event of a crisis. As the comparison with the USA shows (see section 11.2.2), even a significantly higher individual limit (USD 250,000) is not considered sufficient, compelling the authorities to promise unlimited protection to produce the desired calming effect. There is also the question of the extent to which such an increase results in unwanted false incentives (moral hazard).

11.4.5 Creation of an ex ante fund

To counter the procyclical effect of the existing ex post funding, an ex ante fund could be set up in Switzerland, as exists in other countries. This variant has already been discussed a number of times during previous revisions of the deposit insurance scheme and rejected each time by the legislator.

11.4.6 Securing retirement assets

The idea of additional protection for vested benefits and Pillar 3a balances has been submitted for discussion with various procedural requests.[207] The Federal Council already presented different possible solutions in December 2019, in its report in response to postulate 17.3634 "Better protection of vested benefit balances". For the event of a bank failure, an expansion of deposit insurance or an adjustment of preferential rights in bankruptcy under banking legislation could be considered.

As a result of including retirement balances at banks amounting to CHF 90 billion at end-2022 in the deposit insurance, secured deposits at that date rose from CHF 504 billion to CHF 590 billion, causing the scheme's cap to rise from CHF 8 billion to CHF 9.4 billion. With regard to preferential rights in bankruptcy, the retirement balances could be deemed privileged deposits and paid out early, outside the schedule of claims, or the upper limit of CHF 100,000 could be removed for preferential rights in bankruptcy.

The last amendment of the Banking Act, which came into force on 1 January 2023, also included adjustments relating to deposit insurance and preferential rights in bankruptcy, but did not provide for such an expansion of depositor protection.

On 6 March 2024, Parliament approved motion 23.3604 "Better protection for vested benefits and Pillar 3a balances". As implementation affects the BankA, the Federal Council is planning to include this motion directly in the revision of the BankA as part of the work on TBTF.

[206] Principle 9 – Sources and uses of funds: The deposit insurer should have readily available funds and all funding mechanisms necessary to ensure prompt reimbursement of depositors' claims, including assured liquidity funding arrangements. Responsibility for paying the cost of deposit insurance should be borne by banks. See IADI Core Principles for Effective Deposit Insurance Systems, November 2014, p.29

[207] Motion 23.3604 or postulate 17.3634

11.4.7 Conclusion and proposed mix of measures regarding depositor protection

The system of depositor protection underwent a significant change when the most recent revision of the Banking Act came into effect on 1 January 2023. In the course of the drafting and parliamentary debate of this bill and in earlier reform projects, key aspects of depositor protection were discussed, such as the scheme cap, state aid, type of funding (incl. creation of an ex ante fund), the procyclicality of the scheme, the payout period, the individual limit on secured deposits and better protection of vested benefits[208]. The legislator decided to only make changes with regard to the scheme cap, the payout period and the type of funding (posting of collateral but no ex ante fund).

The events in connection with Credit Suisse have shown that the loss of confidence and associated high outflows of deposits had little to do with how depositor protection is designed, as long as this only guarantees a certain, rather low amount of deposits or does not guarantee the full amount. In terms of prevention, too, partial depositor protection only cannot effectively influence the situation of a bank with regard to confidence in it. The TBTF regime's objective of ensuring the continuation of systemically important functions and thus depositors' access to their assets is in this respect independent of depositor protection. In the case of SIBs, it is rather unlikely that the deposit insurance would be used, as all instruments of the TBTF regime would have to be exhausted first. Any adjustments to the deposit insurance can therefore only have an extremely limited impact on mitigating the TBTF issue. For these reasons, the package of TBTF measures outlined does not include any measures regarding depositor protection.

[208] Report of the Federal Council, Bessere Absicherung der Freizügigkeitsguthaben, 31 August 2017

12 Recovery

12.1 Background

12.1.1 Regulatory basis

During the recovery phase, a bank is in the early stages of a crisis, in which the situation is not yet serious enough for a restructuring or bankruptcy liquidation to seem necessary. Although the bank is no longer operating normally, it is in principle still able to manage the crisis on its own. In the recovery plan, SIBs[209] set out what measures for a sustainable recovery they will apply in the event of a crisis, so that they can continue their business activity without state intervention (Art. 64 para. 1 BankO).

FINMA approves the recovery plan. This has been done for all SIBs. The approval focuses on ensuring that the bank's considerations are clear and well thought through, and that there are scenarios that can be applied for larger transactions (e.g. sale of participations or subsidiaries). The obligation to draw up recovery plans therefore primarily serves to force the bank's management to consider crisis situations. However, the recovery plans are based on abstract strategic considerations, while application in a crisis is very specific.

Alongside the recovery plan, all banks have an internal contingency funding plan (CFP). This document is a bank's emergency plan in accordance with Article 10 LiqO. It should ensure that the bank can successfully react to varying liquidity and funding shortfalls as a going concern. The plan covers the key issues of governance, escalation level and improvement options for liquidity and funding.

FINMA also has measures available in its supervisory toolkit that it can take, even in the recovery phase. For example, if a bank violates the provisions of the FINMASA or of a financial market act, or if there are any other irregularities, FINMA has an obligation to ensure the restoration of compliance with the law (Art. 31 FINMASA). The purpose of the legislation is to protect investors and ensure the stability and integrity of the financial market. Such measures can be triggered by violation of the relevant acts or other irregularities, whereby FINMA has a relatively wide scope when assessing irregularities.[210]

Article 31 FINMASA provides a general clause that enables FINMA to take specific measures within the principles of administrative law and with the corresponding discretion, to restore compliance with the law. The full spectrum of administrative measures (including precautionary and preventive) is available to it to this end. FINMA can also apply various administrative sanctions, namely repressive measures, as well as regulatory measures (e.g. Art. 32 ff. FINMASA). Ultimately, it can take other measures outside the FINMASA that come from the individual financial market acts.[211]

According to the FINMASA, FINMA may also appoint an investigating agent to investigate circumstances relevant for supervisory purposes at a supervised person or entity or to implement supervisory measures that FINMA has ordered as a supervisory instrument (see Art. 36 para. 1 FINMASA). An investigating agent can also be appointed as part of protective measures in accordance with Article 26 BankA.

The powers of the investigating agent must be clearly described in the order of appointment, whereby there may be differentiated delegation of powers, namely regarding influence on the corporate governance of an institution, in addition to delegation of powers relating to all business activities, for example. Naturally, the principle of proportionality also applies to the activity of an investigating agent.

These supervisory measures should be distinguished from protection and resolution measures (see section 13.1.1). These are listed in Article 25 BankA and are only applied when there is a risk of insolvency. A risk of insolvency exists if there is reasonable concern that a bank is over-indebted or has serious liquidity problems, or if the bank no longer meets the capital requirements after the deadline set by FINMA. Protective measures can be ordered before or at the same time as restructuring measures or a liquidation.

[209] In Switzerland, only SIBs are required to draw up a recovery plan. Discussions are currently ongoing at international level (in particular in the FSB) regarding a possible extension of this requirement to other banks. The same applies regarding resolution plans

[210] Roth Pellanda and Kopp on Art. 31 FINMASA in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd edition, Basel 2019, margin nos. 1 and 3 ff.

[211] Roth Pellanda and Kopp on Art. 31 FINMASA in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd edition, Basel 2019, margin no. 6 ff.

The Act includes a non-exhaustive list of individual protective measures for banks at risk of insolvency (Art. 26 BankA). Influence can be exercised on the management at the bank by FINMA issuing directives to the management bodies, withdrawing their power of representation in whole or in part, or dismissing them. However, targeted measures are also possible in the business line, for example restricting business activity or payment transactions, or closing the bank. FINMA also has the authority to order a deferment or payment extension.

12.1.2 Credit Suisse case

The contingency funding plan (CFP) of Credit Suisse Group AG and the CFPs of its subsidiaries had an escalation approach. The CFPs had quantitative triggers based on the regulatory requirements in the areas of capital and liquidity, and were fine-tuned based on the risk appetite of the relevant group entities. The CFPs provided for three escalation levels. Level 3 – the highest escalation level – was to be activated if the minimum regulatory liquidity requirements were not met or if internal Pillar 2 buffers were exhausted. In the case of Credit Suisse, Escalation Level 1 was activated on 3 October 2022, Level 2 on 5 October and Level 3 on 1 November.

As ordered by FINMA, a daily liquidity and funding call was held after Escalation Level 1 was reached, in which foreign regulatory authorities also took part. These calls discussed, for example, liquidity forecasts, refinancing activities, customer behaviour and mitigation measures. During the calls, it came to light that the quality and information content of data from the bank were often inadequate. In particular, the forecasts and divisional mitigation measures did not correspond to reality and consistently glossed over the crisis.

Unlike the CFPs, Credit Suisse's recovery plan was not activated. It should be noted that the recovery plan is not triggered automatically but by a decision of the Executive Board. In the event that certain indicators are exceeded, the Executive Board is required to take a positive or negative decision regarding activation, for example when reaching Escalation Level 3. In the case of Credit Suisse, it emerged that the bank's management was not prepared to activate the recovery plan, despite meeting the formal conditions.[212]

The legal consequences in the event that the threshold for activation of the recovery plan is met but that the bank is not prepared to implement it are not explicitly stated. However, FINMA could base its actions on the provision of Article 31 FINMASA ("Restoration of compliance with the law"), which is designed as a general clause. This allows FINMA to order specific measures tailored to the situation in the event of irregularities. These could also include activation of the recovery plan or ordering the implementation of a measure provided for in the recovery plan.

Such an order could be issued by FINMA as a precautionary measure if there is a risk in any delay (Art. 30 para. 2 let. e of the Administrative Procedure Act of 20 December 1968[213], APA). In this case, prior consultation with the bank concerned can be waived, i.e. the decision takes effect before the bank can comment on it. A judicial review takes place if the decision is appealed by the bank, but only at a later stage. It should be noted that FINMA's authority can only serve to require the bodies of the bank concerned to do everything in their power to successfully implement appropriate recovery measures. Any obstacles to implementation remain unchanged. If a bank is forced by a decision to sell an asset, for example, there is no guarantee that a buyer will be found.

In the case of Credit Suisse, FINMA refrained from ordering the activation of the recovery plan. The fact that despite failing to activate the recovery plan, Credit Suisse also attempted – credibly in FINMA's view – to implement some of the measures in it, such as cost reductions or the sale of individual parts of the investment bank, also contributed to FINMA's decision. These measures were part of the strategic repositioning that the bank had already announced in summer 2022.

It became apparent that implementing these measures involved unforeseen difficulties. For example, the selling price set out in the recovery plan could not be obtained due to the market conditions prevailing at the time. Other measures examined by the bank could not be implemented since, for example, no buyers could be found or there were operational hurdles that had not been identified in advance by the bank. Furthermore, those responsible at the bank were unwilling to implement certain measures that would have affected their core strategy (such as sales affecting the Wealth Management or Swiss Universal Bank divisions).

212 See FINMA, Lessons Learned from the CS Crisis, 19 December 2023, p. 72

213 SR **172.021**

12.2 International comparison

12.2.1 Basel Committee on Banking Supervision[214]

Early intervention is a core element in the principles of banking supervision[215] and has been set out in concrete terms in the frameworks for early supervisory intervention.[216] The requirement for banks to have CFPs and how this should be structured are also stipulated in the Basel Framework.[217]

12.2.2 Financial Stability Board

In 2011 and 2014, the FSB established principles for the recovery and resolution of systemically important financial institutions. The Key Attributes stipulate, among other things, that SIBs must have a recovery plan.[218] This should include credible measures for a variety of crisis scenarios and a range of appropriate measures that can be implemented rapidly to address potential capital and liquidity needs in particular. This general requirement is further substantiated in FSB Guidance.

12.2.3 European Union

The early intervention authority of the ECB or Single Supervisory Mechanism (SSM)[219] comprises a wide range of potential measures that can generally be applied to all banks.[220] These include interventions in the reserves policy of banks and orders to use certain bank assets. In addition, the ECB and the national supervisory authorities can intervene in banks' business strategies in this respect by restricting or limiting individual business lines or disposing of them.

Articles 27 ff. of Directive 2014/59/EU (European Bank Recovery and Resolution Directive, BRRD)[221] provide for explicit early intervention measures by the regulatory authorities, particularly when capital and liquidity requirements are not met or are at risk of not being met. In this case, the competent authorities can, for example, 1) require the management body of the institution to implement one or more of the arrangements or measures set out in the recovery plan, 2) require one or more members of the management body or senior management to be removed or replaced, or 3) require changes to the institution's business strategy.

Articles 9 ff. BRRD stipulate specific requirements regarding the recovery plan, outline the criteria for their assessment by the competent authority and stipulate that the bank must have qualitative and quantitative indicators, below which the specific measures are triggered. The European Banking Authority has further specified these indicators.[222]

12.2.4 United States

In the USA both early interventions and recovery plans come under prompt corrective actions.[223] The supervisory authorities divide struggling banks into three categories (undercapitalised, significantly undercapitalised and critically undercapitalised). Various measures are available depending on the category. For example, undercapitalised banks have to produce a plan of how they will rebuild capital, their access to the Fed discount window can be limited or their growth can be restricted. If a bank is significantly undercapitalised, a bonus ban can be imposed, and coupon payments on subordinated bonds can be stopped or high-risk activities can be restricted. Critically undercapitalised banks generally have to be put into conservatorship or receivership. A distinction is made here between discretionary and mandatory measures.

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[214] For an overview of various early intervention approaches, see Svoronos, Early interventions regimes for weak banks, FSI Insights on policy implementation No. 6, April 2018 and the BIS press release, Basel Committee issues final elements of the reforms to raise the quality of regulatory capital, 13 January 2011

[215] BCBS, Core Principles for Effective Banking Supervision, September 2012

[216] BCBS, Frameworks for early supervisory intervention, March 2018

[217] BCBS, Principles for Sound Liquidity and Risk Management and Supervision, September 2008

[218] See FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014 and FSB, I-Annex 4: Essential Elements of Recovery and Resolution Plans, 4 November 2011

[219] The Single Supervisory Mechanism (SSM) denotes the banking supervisory system in Europe. It comprises the ECB and the national supervisory authorities of the participating countries

[220] Official Journal of the European Union, Council Regulation (EU) no. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 15 October 2013, Art. 16

[221] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173 of 12 June 2014, p. 190

[222] EBA, Guidelines on recovery plan indicators under Article 9 of Directive 2014/59/EU, Final Report, 9 November 2011

[223] FDIC, Chapter 5 – Prompt Corrective Action: Formal And Informal Enforcement Actions Manual, June 2022

12.3 Assessment

Despite the recovery plan approved by FINMA, Credit Suisse was unable to recover to the extent that it was able to continue its business activity without state support. The reasons for this lie in both the recovery plan and FINMA's early intervention options.

Recovery plan:

- The planned measures were too limited and there were previously unidentified obstacles to implementation (e.g. preparation periods too long).
- The stigma associated with activation of the recovery plan was a significant obstacle to its activation by the bank.
- Exceeding the escalation indicators without activation of the recovery plan did not result in specific measures being triggered during the crisis.
- The quality and information content of the data provided by the bank during this phase were often inadequate.
- In the case of Credit Suisse, although the recovery plan was (in FINMA's opinion) approvable, there was still scope for improvement; FINMA had instructed the bank to improve the recovery plan accordingly in the planned annual updates.
- The bank lacked willingness to implement the measures proposed in the plan.

FINMA's early intervention options:

- Besides non-approval of the recovery plan, there are no explicit sanctions available to FINMA if the plan does not meet requirements (in contrast to emergency planning, where Article 62 BankO explicitly gives FINMA the authority to order specific measures to address deficiencies). FINMA approved the recovery plan although it needed improvement, and required that the bank implement improvements for the following year's submission.
- If a bank does not want to implement recovery measures itself, this could be ordered by FINMA based on the general clause of Art. 31 FINMASA. This raises the question of legal certainty. The greater the degree of interference inherent in the recovery measured ordered, the more important this question becomes.
- The protective measures provided for by law (Art. 26 BankA) can only be taken when there are justified concerns that a bank is overindebted or has serious liquidity problems, or if the bank no longer meets the capital requirements after the deadline set by FINMA. The decision as to whether such a situation exists is at FINMA's discretion.

12.4 Possible measures

The following sections discuss possible measures in the area of recovery. These can be assessed taking into account their individual advantages and disadvantages. Due to their interdependencies, the measures in the subject area are assessed together as a whole. Accordingly, section 12.4.3 below presents conclusions.

12.4.1 Stricter recovery plan requirements

As a consequence of the Credit Suisse case, FINMA has already announced a review of the process and criteria for approval of the recovery plan within the existing legal framework.[224] The purpose of this review includes giving the recovery plan an even more operational structure and examining and testing it in more detail before possible approval in future.

This includes the further development of concepts and criteria to activate the recovery phase and the associated triggering of the recovery measures. The trigger thresholds for recovery plans could be adjusted such that they would already take effect at a considerably earlier stage, meaning that the potential stigma associated with the triggering of the measures would be much less destabilising. The length of implementation of measures can also be further reduced through better preparation and early triggering. In addition, crisis reporting by the SIBs could be improved (timely data, data quality, reporting frequency, degree of automation, scenario-dependent forecasts, etc.).

[224] See FINMA, FINMA report on the Lessons Learned from the CS Crisis, 19 December 2023

In general, an inadequate plan should no longer be approved subject to conditions but be rejected as such. Substantial changes to the structure of the recovery plan could thus become necessary for SIBs, especially internationally active SIBs, which are also associated with costs. The need to adapt the legal framework should also be examined against this background.

As a possible measure, the regulatory requirements for the recovery plan could be increased. In addition, specific criteria could be specified in the Banking Ordinance both for the drawing up of the plan by the bank and for its approval by FINMA.

Moreover, evidence from the bank that it meets the objective and requirements of the recovery plan is conceivable (similar to the conditions for the emergency plan in Article 60–63 BankO). Finally, FINMA could explicitly be given the authority to order measures to address deficiencies (e.g. capital and liquidity surcharges) in recovery planning, similar to the emergency planning requirements.

12.4.2 Strengthen early intervention options for FINMA

While by law, FINMA currently has measures available in its supervisory toolkit that it can take in the recovery phase, it has no explicit legal authority to instruct a bank to activate the recovery plan or implement the measures envisaged therein. Although there are protective measures provided for by law under which an intervention would be possible, these only take effect when, in FINMA's estimation, there are justified concerns that a bank is overindebted or has serious liquidity problems, or if the bank no longer meets the capital requirements after the deadline set by FINMA.

Specific criteria and early intervention measures by FINMA and the period during which these could be taken could be enshrined in legislation as possible measures. This would give FINMA a clearer legal basis in future to take the right measures in good time. The design of possible measures could be based on existing "protective measures" in insurance regulations according to Article 51 IOA or the measures proposed in the EU. Another conceivable measure would be to include FINMA's power to trigger specific measures from the recovery plan more clearly and explicitly in the legislation, in order to increase the legal certainty of such an order.

In specific terms, existing measures in the current framework could also be applied at an earlier stage. For example, measures that currently come under protective measures (directives to management bodies, replacing management bodies, appointing investigating agents, etc.) could already be applied in a recovery phase, or even earlier.

An early intervention by FINMA could also take place based on market indicators (e.g. prices of equities or credit default derivatives) and forward-looking indicators (e.g. results of stress tests, agency ratings). Since such indicators are subject to general market fluctuations, they also include white noise. However, this means that developments that are underestimated or not recognised by the authorities or the other regulatory indicators can be taken into account. Based on market indicators and forward-looking indicators, FINMA could initiate investigations or the compilation of reports, for example. This recommendation is also supported by the Expert Group on Banking Stability[225] and the Tarullo expert opinion.

A further potential component in the area of early intervention is the more specific definition of a PONV, especially with regard to liquidity. This has the advantage that measures would also be taken in good time in the event of a liquidity crisis, even if capital ratios are not (yet) affected, for example.

12.4.3 Conclusion and proposed mix of measures regarding recovery

Alongside other measures, such as those in the area of capital or corporate governance, measures in the area of recovery form a key element in strengthening prevention. Early intervention should – in line with Article 51 IOA – also be possible before the recovery phase, and over and above the bank's recovery measures. It should be possible for a distressed bank to recover and become a going concern again through timely measures according to clear criteria.

The measures proposed in sections 12.4.1 and 12.4.2 are necessary and appropriate to further strengthen the preventive effect of the TBTF regime. They are also reasonable by international comparison. Therefore, both of the measures in the area of recovery are proposed for implementation.

[225] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023

More effective recovery planning on a broader legal basis could further reduce the likelihood of restructuring or bankruptcy. In addition, a valid recovery plan should be in the SIBs' own interests. Improved crisis prevention lowers the risks to the state.

More specific legal requirements mean a strengthening of FINMA's early intervention options and obligations, and hence also more responsibility for FINMA as it enables increased intervention into the bank's business decisions in the going concern. At the same time, a more specific and expanded legal basis for early intervention options gives FINMA greater legal certainty for ordering measures in a timely manner in a crisis, including against the will of the bank's management where necessary. Thus – and this is a particularly important aspect – this instrument increases pressure on the bank to take the relevant measures itself.

As regards practical implementation, the findings of the PInC regarding FINMA's actions in the recovery phase at Credit Suisse should be awaited. It can be expected the certain improvements can also be achieved under existing legislation, and only those regulatory changes that are needed to achieve the objectives should be presented. These expanded powers should be precisely aligned with the principle of proportionality.

13 Resolution

13.1 Background

13.1.1 General

The term "resolution" refers to intervention by FINMA to carry out the restructuring or bankruptcy liquidation of a bank. FINMA intervenes if there are reasonable grounds for concern that a bank is over-indebted or has serious liquidity problems, or if the bank does not meet the capital requirements (Art. 25 para. 1 BankA). The initiation of a restructuring procedure also requires that there be a reasonable prospect of a successful restructuring of the bank or continuation of individual banking services (Art. 28 BankA). FINMA assesses the timing of the intervention in a forward-looking way, using both quantitative and qualitative criteria.

FINMA can also take protective measures. Examples of these are listed in Article 26 BankA. In particular, the bank can be prohibited from making payouts for a certain period of time. This can protect it from an excessive withdrawal of deposits in the event of an imminent bank run. Protective measures are usually taken outside or prior to any restructuring procedure. However, they can serve to prepare for a subsequent restructuring or bankruptcy liquidation, or be prescribed in connection with a restructuring procedure or a bankruptcy liquidation.

When implementing a restructuring procedure, FINMA can undertake single or multiple restructuring measures. If the restructuring of the entire bank is successful, the bank's legal personality is retained (see Art. 29 BankA). However, rescuing the entire bank or banking group concerned is not a prerequisite. FINMA can also initiate restructuring with the aim of only continuing individual banking services. This is the case, for example, if it transfers certain services to an acquiring legal entity irrespective of the continued existence of the bank concerned (Art. 30 BankA). In this case, the services that cannot be continued will be liquidated.

Ultimately, bankruptcy of the bank must be ordered if there is no prospect of restructuring or if such restructuring has failed (Art. 33 BankA). Bankruptcy liquidation is therefore the last resort for dealing with a bank that can no longer be saved. In this case, FINMA must withdraw the bank's licence and publicly order a bankruptcy liquidation. For SIBs, this involves triggering the emergency plan, which ensures the continuation of systemically important functions.

13.1.2 Overview of restructuring measures

In addition to a full or partial bail-in (Art. 30*b* BankA), the law provides for other instruments as restructuring measures, in particular the continuation of individual banking services, a transfer of the bank's assets or parts thereof to other legal entities or to a bridge bank, a combination with or takeover by other companies, and a change of the bank's legal form (Art. 30 BankA). In addition, there are general aspects of a restructuring, such as restructuring measures, adjustment or repositioning of the business model, as well as governance measures, which are also implicitly derived from Article 30*c* paragraph 2 letters c, e and g BankA.

As an accompanying measure, the law also provides for a stay on the termination of contracts (Art. 30*a* BankA). This is usually ordered in connection with another restructuring measure such as bail-in. The background to this is the fact that standard contracts in the banking business often contain clauses that allow a bank's counterparties to terminate the corresponding contracts prematurely if the authorities intervene in that bank. In order to prevent mass termination of these contracts, FINMA can impose a stay of termination rights lasting for a maximum of two working days. However, if the bank concerned meets the licensing requirements again after the stay has expired, the relevant termination rights can no longer be exercised.

13.1.2.1 Bail-in

Bail-in as a restructuring measure was already included in the BankA in a rudimentary form in 2011. The implementing provisions for this were laid down in the FINMA Banking Insolvency Ordinance of 30 August 2012.[226] In the most recent partial revision of the BankA, which came into force on 1 January 2023, bail-in is dealt with in detail in Article 30*b* under "Capital measures". This means that there is now a sound legal basis for implementing this restructuring measure.

A bail-in under Article 30*b* BankA involves converting debt into equity as part of a restructuring procedure. As a result of this conversion, the creditors lose their claims to repayment and instead receive shares in the bank. From the bank's perspective, the elimination of the repayment obligation means that its capital base is strengthened. The immediate goal of a bail-in is to restore the bank's capital base so that it meets the capital requirements again.[227]

A bail-in under Swiss law (Art. 30b BankA) requires the bank's entire share capital to be written down as a first step. The owners of the bank, usually the shareholders, thus lose their ownership status. If a bank also has outstanding debt instruments that qualify as convertible capital or write-off bonds (AT1 instruments), these must also be converted and completely written down at the same time or completely written down.

Only then is debt converted into equity. This is done according to a certain hierarchy. First, subordinated claims must be converted. Next to be converted are any bail-in bonds, i.e. debt instruments issued specifically for the purpose of absorbing losses in the event of a bail-in. The remaining claims can then be converted and finally the non-preferred deposits (deposits over CHF 100,000). Privileged claims, as secured claims and claims eligible for netting are excluded from a bail-in.

A bail-in can only be successful if there is enough debt capital that can be converted into equity if necessary. For this reason, SIBs are subject to gone-concern capital requirements (see section 7.2). These requirements can be met by issuing bail-in bonds. Bail-in bonds must meet certain requirements to ensure that a conversion is legally enforceable. In particular, their terms of issue must contain a clause in which the purchasers agree in advance to any conversion of their repayment claims.

In addition to the bail-in bonds, SIBs have issued other loss-absorbing debt instruments, most notably AT1 instruments. Unlike bail-in bonds, AT1 instruments can also be used to meet going-concern capital requirements since, as a Tier 1 instrument, they can absorb losses even before a restructuring procedure is initiated. In this report, the term "bail-in" refers exclusively to the conversion of debt into equity as part of the implementation of a restructuring procedure, i.e. not to the write-down of AT1 instruments due to a contractual trigger event outside a restructuring.

13.1.2.2 Asset transfer and merger

Under the heading "Continuation of banking services", the BankA provides for various measures whereby the assets of the bank concerned can be transferred to another legal entity or a bridge bank. Under Article 30 paragraph 2 BankA, the bank's assets may be transferred to an acquiring legal entity or a bridge bank, the bank may combine with another company, another legal entity may take over the bank or the legal form of the bank may be changed. All of these measures may be implemented as part of the restructuring procedure, to the exclusion of the Mergers Act of 3 October 2003[228] (MergA).

The background to these restructuring measures is the idea that it should be possible to continue individual banking services for a certain period of time, particularly by transferring them to a bridge bank, with the aim of maintaining systemically important functions at least for a certain period. There is a considerable degree of flexibility regarding the form of the transfer. The systemically important functions may be transferred to a bridge bank and continued there for a certain period while the residual bank is liquidated. Alternatively, it would also be possible to transfer the non-systemically important functions to a bank to be resolved, in order to reduce the size of the bank to be restructured and to simplify its continuation.

The legal provision was supplemented as part of the partial revision of the BankA in 2021, so that it now expressly includes the possibility of a bank that is being

[226] SR **952.05**

[227] FINMA, Resolution Report 2020, February 2020, pp. 18 and 20

[228] SR **221.301**

restructured combining with another legal entity (Art. 30 para. 2 let. b BankA).[229] The Act deliberately uses the term *Zusammenschluss* (combination) rather than *Fusion* (merger), as ad hoc applicability of the MergA was expressly precluded. This means that various requirements that must usually be met for a merger, such as the approval of the merger agreement by the general meeting (Art. 12 MergA), are not necessary when applying this restructuring measure in the case of the bank to be restructured. It is sufficient if the requirements in terms of the restructuring plan are met (Art. 30*c* para. 1 BankA). As a use case, the dispatch cites the combination of several banks organised in a cooperative association to form a single company. In the case of SIBs, the combination takes effect upon approval of the restructuring plan (Art. 31*d* para. 1 let. a BankA).

13.1.3 Resolution strategy for the Swiss G-SIBs

A resolution strategy defines the objective of the restructuring (continuation of the bank as a whole or only of individual services) and the measures to be adopted in pursuit of this objective (e.g. bail-in). The resolution strategy differs from bank to bank and is therefore determined individually for each SIB.

With regard to G-SIBs, FINMA publicly stated as early as 2013 that restructuring by means of a single point of entry (SPoE) bail-in is the preferred strategy. SPoE means that FINMA intervenes at the level of the uppermost entity in the group (the group holding company).[230] Plan A for restructuring a G-SIB thus consists of recapitalising the banking group by converting debt into equity.

In the event that this preferred strategy is not possible or fails, FINMA has defined a secondary strategy for G-SIBs. This Plan B involves dividing up the entire group, placing the group holding company and other entities into bankruptcy liquidation and activating the Swiss emergency plan to protect the functions that are systemically important for Switzerland.

For SIBs that are not internationally active, the content of the emergency plan mirrors that of the resolution strategy. In the case of ZKB, the Canton of Zurich, which is liable as guarantor for all non-subordinated liabilities, would first of all be called upon to bear losses. In the case of PostFinance, the Swiss Confederation, as the indirect owner, would temporarily cover the capital shortfall in the event of a resolution. With Raiffeisen, FINMA would merge the over 200 independent Raiffeisen banks into a resolution entity in order to then restructure them in a single procedure.[231]

13.1.3.1 Plan A: Continuation of the bank via SPoE bail-in

Under the SPoE bail-in planned for Swiss G-SIBs/UBS, FINMA intervenes at the level of the group holding company. The other group entities would not be directly affected by the restructuring ruling. This has the advantage that the relevant operating group companies can continue their business operations without interruption outside insolvency proceedings, regardless of whether they are domiciled in Switzerland or abroad. In addition, only one procedure needs to be carried out.

Although the subsidiaries would not be directly affected, losses incurred in these companies could be absorbed as part of the SPoE bail-in. This is done through intragroup mechanisms. First, the funds raised from the issue of bail-in bonds are passed on to the subsidiaries via internal loans. In the event of a bail-in, the holding company waives the repayment of these loans, resulting in the recapitalisation of the subsidiaries.[232]

As noted, in a restructuring the holding company's share capital is first completely written down, meaning that the shareholders would lose their ownership status. Immediately beforehand, the outstanding AT1 instruments would be fully written down or converted. In other words, the creditors of the debt instruments concerned would lose their claims to repayment. The other creditors' claims

[229] BBl **2020** 6359

[230] See FINMA, Annual Report 2013, p. 44, and FINMA, Resolution Report 2020, February 2020, p. 20, where FINMA reaffirmed the SPoE approach for G-SIBs

[231] See FINMA press release, FINMA assesses the recovery and resolution plans of systemically important institutions again, 26 April 2023, and the links to further information

[232] FINMA, Resolution Report 2020, February 2020, p. 20 ff.

could then be converted according to the bail-in hierarchy. At UBS, the claims based on the bail-in bonds in particular would be converted. The bail-in would result in the creditors of these claims losing their right to repayment but becoming shareholders as a result of the conversion.

The aim of the SPoE bail-in in the case of UBS would be to restore a sound capital base for the bank. This would enable UBS to continue operating as a banking group, although a restructuring would generally involve extensive structural changes. In addition to recapitalisation by means of a bail-in, the business model of the bank concerned would also likely be adapted to the new situation, taking into account the circumstances that led to the need for intervention.[233]

13.1.3.2 Plan B: Break-up/emergency plan

In the event that the primary resolution strategy is not possible or fails, FINMA has defined a secondary strategy. Unlike the primary resolution strategy, this Plan B does not aim at the continued operation of the entire banking group. Rather, the group would be split up and the fate of the individual group companies determined individually.

The group holding company and the group entities that are not systemically important for Switzerland would be resolved in a bankruptcy liquidation. At the same time, the Swiss emergency plan would be activated to ensure the continuation of functions that are systemically important in Switzerland. The Swiss emergency plan identifies how the dependencies of the Swiss entity (UBS Switzerland AG in the case of UBS) on the rest of the banking group can be dissolved and the functions that are systemically important for Switzerland can continue to be operated independently of the other group companies to be resolved (see section 13.1.7).

13.1.4 Appraisal of bail-in

In the case of the Credit Suisse rescue, various measures were discussed, including FINMA's primary resolution strategy of SPoE bail-in. In the end, the latter was not implemented.[234] This section examines certain challenges specifically associated with bail-ins. This assessment also looks at how the applicability of this instrument could be enhanced (see section 13.4).

13.1.4.1 Bail-in as a response to loss of confidence

There is a lack of practical experience with bail-ins, as the instrument has never been applied to a G-SIB either in Switzerland or abroad. It is particularly unclear what the effects of a bail-in would be in the event of liquidity problems, which usually accompany a banking crisis.

There is no doubt that, if the market considers a bank's capitalisation to be inadequate, this can lead to a loss of confidence and thus to a liquidity crisis. Consequently, there is a close connection between capital and liquidity. However, confidence in the bank also depends on other factors, such as the credibility of the management, the legal framework, the business model and the general market environment. With regard to the effectiveness of a bail-in, a distinction must be made between liquidity crises that are caused (at least in part) by market perceptions that the bank's capital base is insufficient and those in which other factors are integral to the loss of confidence. A bail-in is particularly suitable for the former cases, as its primary aim is to restore the capital ratio. The bank does not receive any liquidity as a result of the bail-in.[235]

A bank with liquidity problems may require a bail-in even if it meets the regulatory capital requirements. For in this case, too, increasing CET1 capital by means of a bail-in could help to restore market confidence and reduce liquidity outflows, particularly as this provides sufficient capital for restructuring.[236]

[233] FINMA, Resolution Report 2020, February 2020, p. 21

[234] Botschaft über den Nachtrag IA zum Voranschlag 2023, 29 March 2023, p. 17

[235] At most, bail-in results in a slightly lower outflow of liquidity due to the elimination of interest and amortisation payments

[236] This is particularly the case if the bail-in is accompanied by further restructuring measures, such as the appointment of new management bodies or changes to the business model

This was also the assumption of legislators in introducing the value adjustment (Art. 31c BankA) for the event of a bail-in which is due to serious liquidity problems for example, but where bank is not yet over-indebted.[237] The new special liquidity requirements for SIBs, which are to be fully complied with by the end of 2024, also assume that a bail-in would help to boost confidence in the event of liquidity problems (see section 8.2.2). They assume a scenario in which a bail-in is carried out after 30 days of liquidity stress, leading to a recovery of the bank and thus to a reduction in outflows.[238]

13.1.4.2 Contagion risk

If a bail-in is implemented, the creditors of the bail-in bonds may have to reckon with significant losses. Apart from the associated legal risks, a bail-in could have a massively negative impact on the markets, especially in the case of a G-SIB. This was also an issue in the Credit Suisse case. The extent to which the contagion risk emanating from a bail-in has the potential to trigger a crisis on the financial markets is disputed.[239]

The composition of the creditors whose claims would be converted as part of a bail-in is not known either to the issuing banks or to the authorities. The banks only have data on the initial purchasers of the bail-in bonds they issue. This data suggests that bail-in bond creditors are largely financial market institutions based abroad. However, it should be noted that, at the level of individual banks, investments in bail-in bonds and other capital instruments issued by G-SIBs are restricted by an international standard.[240] Data on secondary-market purchasers is not available.

Owing to the unclear data situation, the contagion risk in the event of a bail-in is difficult to assess.

13.1.4.3 Guarantee requirements

Another consequence of a bail-in is that it would initially remain unclear what the bank's ownership structure would be following the bail-in. For this reason, it cannot be determined in advance whether certain of the new owners will have a qualified participation in the bank and, if so, whether they meet the requirements to guarantee that their influence will not be detrimental to prudent and sound business activity (Art. 3 para. c^{bis} BankA).

13.1.4.4 Timing of intervention and coordination

By law, FINMA has considerable discretion as to whether a restructuring procedure should be initiated. There is no clearly defined point in time at which action must be taken. The Act speaks of the need for "reasonable grounds for concern" about over-indebtedness or serious liquidity problems (Art. 25 para. 1 BankA).

According to the dispatch, there are reasonable grounds for concern that a bank has serious liquidity problems if, for example, it "is not in a position to obtain liquid funds at market conditions and it must be assumed that the available liquidity will no longer be sufficient to meet the obligations that are due or will become due in the near future".[241] The law is thus vague and gives FINMA considerable discretion. While this creates flexibility that may be advantageous in certain circumstances, it could also make it more difficult to identify the appropriate time for intervention and places a very heavy responsibility on FINMA as the decision-making body.

Furthermore, there is no explicit obligation to implement a bail-in in case of a restructuring. Rather, FINMA has considerable discretion to decide which measure seems most appropriate. This also provides a high degree of flexibility, which is useful in that different approaches can be chosen depending on the nature of the crisis. The downside is the lack of predictability for crisis management by the authorities.

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[237] See BBl **2020** 6359, p. 6395, which explicitly states that the ordering of capital measures may already be appropriate under certain circumstances if the bank concerned is not yet over-indebted but is nevertheless experiencing serious liquidity problems

[238] FDF, Erläuterungen zur Änderung der Liquiditätsverordnung (Besondere Bestimmungen für systemrelevante Banken – "Too big to fail"), 3 June 2022, p. 13

[239] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023, p. 31

[240] BCBS, Standard: TLAC holdings, October 2016

[241] BBl **2002** 8060, p. 8079

In addition, the law places the responsibility for making the decision about restructuring or bankruptcy liquidation solely on FINMA. If a SIB is affected, the recent crisis has shown that successfully overcoming a crisis generally also requires measures that lie within the remit of the SNB (liquidity provision) or even of the Federal Council and Parliament's Finance Delegation (PLB). The lack of consolidation of this distributed decision-making power at the legislative level and thus the distributed but not independent responsibilities may impair the authorities' ability to act in a crisis (see also chapter 17).[242]

13.1.4.5 Legal certainty

As stated above, a bail-in serves to restore the bank's capital base and is also intended to cover future losses and costs associated with the restructuring. A bail-in should generally increase the regulatory capital to a level that exceeds the requirements. This increase must be justified by the high expected future losses and restructuring costs.

A bail-in represents a serious encroachment on the rights of the bank's owners and affected creditors. The complete write-down of the share capital means that the owners lose all of their claims as shareholders (Art. 30*b* para. 5 let. b BankA). The creditors of convertible capital and write-off bonds also lose their claims (Art. 30*b* para. 5 let. a BankA).

With any bail-in, it can be assumed that the groups incurring losses will question the necessity of a bail-in by means of legal challenges. This applies all the more if the bail-in leads to an "increase" in capital to a level that significantly exceeds the regulatory requirements, which is likely to be necessary in an acute crisis. Although the appeal options are restricted by law and the bail-in in particular cannot be reversed (Art. 37*g*^{bis} para. 1 BankA), this could lead to considerable legal uncertainties and undermine confidence in the success of the restructuring.

In addition, with a bail-in, the question always arises as to whether the liabilities based on bail-in bonds should be converted in full or only in part. Partial conversion is possible, but will result in a lower CET1 capital ratio. A partial bail-in makes sense particularly if the future restructuring costs and losses are precisely known and the bail-in requirement can therefore be precisely calculated. Even in the event of a partial conversion, the existing share capital would have to be completely written down first.

13.1.4.6 Complexity regarding bail-in hierarchy

The partial revision of the BankA that came into force on 1 January 2023 enshrined the bail-in hierarchy in law while also creating a separate rank for bail-in bonds, thus making it clear that bail-in bonds are to be used to absorb losses before regular liabilities. The hierarchy is set out as follows in Article 30*b* paragraph 7 BankA:

1. subordinated claims;
2. claims based on bail-in bonds;
3. other claims, excluding deposits;
4. deposits.

However, Article 30*b* paragraph 8 BankA provides for an exception to this principle that is important in practice. If bail-in bonds are issued by a group holding company and the "other claims" do not exceed 5% of the nominal value of the total eligible bail-in bonds, the bail-in bonds take the rank of "other claims" and the claims that actually fall into this category are excluded from the bail-in. The provision means that the bail-in bonds classed as "other claims" are converted and the liabilities that actually fall into this class are excluded from the bail-in. The hierarchy is thus as follows:

1. subordinated claims;
2. claims based on bail-in bonds;
3. deposits.

[242] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023, p. 26 ff.

A key factor in determining whether or not the 5% threshold under Article 30*b* paragraph 8 BankA is met is the time at which the restructuring plan is approved.[243] Thus, it is only in the specific circumstances of application that the hierarchy applying to the bail-in is decided.

The conversion of "other claims" is only possible in the regular hierarchy in accordance with Article 30*b* paragraph 7 BankA. In the case of G-SIBs, these "other claims" typically only make up a minimal proportion of the liabilities side of the bank's balance sheet. As such, they are not a key factor in the successful implementation of a bail-in. The special rule provided for in Article 30*b* paragraph 8 BankA is therefore intended to prevent the creditors of the "other claims" from legally contesting a bail-in of their claims and thus jeopardising the necessary swift implementation of the bail-in as a whole. The disadvantage of this is that, before a bail-in is carried out, it is unclear to the creditors of liabilities classed as "other claims" whether they will be affected by the bail-in.[244]

A further complexity associated with bail-in is that the terms of issue of the bail-in bonds conceal their subordination in the event of a bail-in.[245] Thus, the terms of issue do not indicate that bail-in bonds must be legally or contractually subordinated to other obligations of the issuer or structurally subordinated to obligations of other group companies in accordance with the CAO (Art. 126*a* para. 1 let. e). The Swiss G-SIBs have opted for "structural" subordination. Accordingly, their bail-in bonds are issued at the group holding company level. As the bail-in starts at this level, only claims against the holding company are affected by the conversion. This means that the corresponding bail-in bonds automatically meet the CAO's subordination requirements. On this basis, it is also possible for the Swiss G-SIBs to issue their bail-in bonds as "senior bonds" and explicitly label them as "non-subordinated". It is not necessary to indicate that the instruments concerned are "structurally subordinated".[246]

This results in more advantageous interest rates for the issuing banks,[247] but also entails a significant lack of transparency, as investors do not make a clear distinction between bail-in bonds and senior debt instruments. One way to make this distinction clearer would be to introduce a regulatory obligation to explicitly design bail-in bonds as contractually subordinated instruments. Alternatively, the bail-in bonds could be designated as "senior non-preferred" instruments, similar to the EU requirements (see section 13.2.1).[248]

13.1.4.7 Bail-in bonds issued by cantonal banks

Following the last partial revision of the BankA, FINMA is now able to provide for deviations from the provisions on the restructuring procedure for cantonal banks and, in particular, designate debt instruments that are reduced prior to a complete write-down of the share capital, provided that these allow for appropriate subsequent compensation of creditors (see Art. 28*a* para. 3 and 30*b* para. 6 BankA).

The rule is specifically tailored to the situation of ZKB, which is wholly owned by the Canton of Zurich and also benefits from an explicit state guarantee from the latter. Should a bail-in of ZKB become necessary despite this guarantee, these instruments could absorb losses without the canton losing ownership of the cantonal bank (the usual fate of bank owners in the event of a bail-in).

ZKB has already made use of the new option and issued corresponding bail-in bonds.[249] These ZKB bail-in bonds have the characteristics of AT1 instruments in that they absorb losses before the bank's equity and can also be written down on their own if necessary. Unlike regular bail-in bonds, ZKB bail-in bonds cannot be converted into equity. On the other hand, they are akin to regular bail-in bonds in that they can only be written down as part of a restructuring procedure. Automatic triggering or write-down outside a restructuring procedure, as exists with AT1 instruments, is not possible.

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243 BBl **2020** 6359, p. 6390

244 Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 29

245 The bail-in bonds issued by the Swiss G-SIBs simply contain a recognition clause whereby the creditors confirm that they agree to any conversion of their claims as part of a restructuring procedure. However, the recognition clause says nothing about the hierarchy according to which the creditors' claims would be converted

246 The bail-in bonds issued by Credit Suisse have now been taken over by UBS as the new debtor

247 Indergand and Hrasko, Does the market believe in loss-absorbing bank debt?, SNB Working Papers 13/2021, 3 August 2021, p. 25

248 Indergand and Hrasko, Does the market believe in loss-absorbing bank debt?, SNB Working Papers 13/2021, 3 August 2021, p. 25/26 f.

249 ZKB press release, Zürcher Kantonalbank launched a CHF 425 million bail-in bond, 5 April 2023

The differences in the function of these ZKB bail-in bonds compared with regular bail-in bonds make matters more complex, as the mechanics of bail-in bonds can vary depending on the issuing bank. The obligation inherent in these instruments to pay subsequent compensation to the creditors of the written-down bonds under certain circumstances also raises further implementation issues.

13.1.4.8 Transfer of value from existing shareholders to bail-in bond creditors

Prior to a bail-in, the share capital must be completely written down (Art. 30*b* para. 5 let. b BankA). This means that all equity still existing at the time of the bail-in is transferred to the new shares created with the bail-in. The complete write-down of the share capital is intended to ensure that any losses are primarily borne by the bank's owners.[250] This reasoning has been criticised in the legal profession, as equity automatically absorbs losses.[251] A mandatory complete write-down of the remaining share capital would therefore not be necessary.

In cases where the bank concerned is not yet over-indebted or even still meets the regulatory capital requirements, a complete write-down of the share capital could lead to inappropriate outcomes. In such circumstances, the bail-in might result in a gain for the creditors concerned, to the detriment of the shareholders affected by the write-down. In the case of Credit Suisse, the bail-in would have been performed at the level of the group holding company, i.e. Credit Suisse Group AG (on the SPoE approach, see section 13.1.3). Subsidiaries, in particular Credit Suisse AG and Credit Suisse (Schweiz) AG, would not have been directly affected by this procedure. Prior to a bail-in taking place, the write-off bonds would have had to be completely written down (Art. 30*b* para. 5 BankA). At the end of 2022, Credit Suisse had outstanding AT1 and Tier 2 bonds with a nominal value of approximately CHF 16 billion.[252] At the same time, its reported share capital at the end of 2022 totalled approximately CHF 45 billion. This capital attributable to shareholders would also have been completely written down.

The existing shareholders would have thus been replaced by the new shareholders created as a result of the bail-in. At the end of 2022, there were repayment claims based on bail-in bonds from Credit Suisse creditors totalling around CHF 57 billion. The full conversion of these claims would have resulted in an increase in the group's CET1 capital to around CHF 107 billion. The creditors of the bail-in bonds would therefore have lost their repayment claim, but in return they would have been entitled to the entire equity. The bail-in would thus have led to a transfer of value from the existing shareholders to the bail-in bond creditors. Depending on the market price of the new shares created by the bail-in, the latter could potentially have made a profit.

To prevent this potential transfer of value, Parliament has introduced a provision on "value adjustment" in Article 31*c* BankA. According to this, the restructuring plan may provide for an appropriate value adjustment for the owners of a bank affected by the write-down of equity if the bail-in results in the value of the equity allocated to the creditors exceeding the nominal value of the converted claims.

In the event of a bail-in at Credit Suisse, the condition for a transfer of value would probably have been met, as the creditors of the bail-in bonds would have become owners of a bank with equity of around CHF 107 billion in return for the conversion of their claims with a nominal value of around CHF 57 billion.

In practice, implementing a value adjustment entails various difficulties. First of all, it is extremely difficult to determine a bank's equity, especially in a crisis, because, as noted in the dispatch, there is no market value for some of the balance sheet items. However, the dispatch states that the amount of the value adjustment must already be determined at the time of the restructuring plan, as clear conditions must be created as quickly as possible.[253] This poses the challenge of how the figures required to calculate the value adjustment can be calculated with sufficient certainty at the time of the bail-in.

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[250] BBl **2020** 6359, p. 6388

[251] Mauchle, Bail-in bei systemrelevanten Banken, GesKR 02/2019, Zurich/St Gallen 2019, p. 255

[252] Credit Suisse Group AG, Annual Report 2022, 14 March 2023, p. 126

[253] BBl **2020** 6359, p. 6395

A value adjustment can be made in particular through the allocation of shares, other participation rights (e.g. participation or profit sharing certificates), options or debtor warrants. Regardless of the type, the instruments allocated to existing shareholders should be immediately tradable.[254] Timely valuation of the allocated instruments poses a challenge in this respect, similar to valuation of the bank's equity.

Whether and to what extent a value adjustment would be paid to the existing shareholders therefore depends on various factors and is also largely at the discretion of FINMA.[255]

13.1.4.9 Cross-border issue

The bail-in of a G-SIB would only directly affect the group holding company domiciled in Switzerland. Moreover, FINMA's order can only have direct legal effect in Switzerland. Whether and to what extent the bail-in also has an effect in foreign jurisdictions depends on the provisions in force in those places. In the event of legal disputes, it depends in particular on whether the bail-in has been recognised there and on the local courts. With a G-SIB in particular, this is an important consideration owing to the high level of international interconnectedness.

This complexity is further heightened if the equity and debt instruments issued by the bank are traded on foreign stock exchanges. This means that both the issuer and the equity/debt instruments are under the purview of foreign legal systems that are not necessarily congruent with the Swiss approaches in every respect.

It can be assumed that a significant proportion of bail-in bond creditors will have their residence or domicile abroad. Whether and to what extent they have to accept the conversion of their claims does not depend solely on Swiss law, as explained above.

Various efforts have been made to alleviate the cross-border issue. Firstly, bail-in bonds must contain a recognition clause in which creditors agree to any conversion by FINMA (Art. 126*a* para. 1 let. h CAO). There is also close cooperation between the Swiss and foreign supervisory and resolution authorities. Although this is based on certain predefined guidelines, there are no legally binding cooperation agreements. Consequently, opportunistic behaviour by foreign regulators cannot be ruled out and is even to be expected in crisis situations. For example, if a bail-in were to be carried out, foreign authorities or courts could refuse to recognise it, thereby creating significant legal uncertainties.[256]

The fact that this cross-border issue poses risks was also confirmed from another perspective in the case of Credit Suisse. As part of a bail-in, creditors' claims are converted to equity. In practice, this means that newly created shares in the affected bank are allocated to the creditors concerned. With regard to US investors, the US Securities Act and Securities Exchange Act would have applied. These laws stipulate that every issue of a security must either be registered or fall under an exemption. As registration would have taken too long, an exemption would have been necessary to implement the bail-in. There was no prior confirmation from the U.S. Securities and Exchange Commission that the exemption would have been applicable in the case of the conversion of Credit Suisse's bail-in bonds. This meant that legal uncertainty remained in this regard, which posed both implementation and legal risks.[257]

[254] BBl **2020** 6359, p. 6396

[255] For more on this whole topic, see: Mauchle, Bail-in bei systemrelevanten Banken, GesKR 02/2019, Zurich/St Gallen 2019, p. 256.

[256] Kuhn, Sanierung und Abwicklung systemrelevanter Banken in: Jans et al. (eds.), Krisenfeste Schweizer Banken? Die Regulierung von Eigenmitteln, Liquidität und "Too Big to Fail", Zurich 2018, 483–529, p. 461

[257] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023, p. 30

13.1.4.10 Short preparation time and data basis

In the international context of resolution planning, the working hypothesis has been based on a "runway period" – i.e. the time between the realisation that the point of non-viability (PONV) has been reached and the initiation of a restructuring procedure – of around two to six weeks. This scenario is likely to apply particularly in the event of a capital erosion or a capital shortfall (e.g. due to a fine). In October 2022, in view of the massive liquidity outflow in the case of Credit Suisse, a significantly shorter runway period of seven to ten days was defined. In the end, however, the runway period actually available in the Credit Suisse case was just four days.

One of the risks associated with a short runway period is that the data available to assess the capital and liquidity situation when the restructuring procedure is initiated will not be of sufficiently high quality. For the bail-in, this means that on the day the restructuring plan is approved, complex questions have to be answered about the amount of capital still available and the amount required in the future. This in turn makes decision-making more difficult and increases the risk that shareholders affected by the write-down and creditors affected by the bail-in will mount a challenge.

13.1.5 Asset transfer and merger

13.1.5.1 Description

As already explained above, Article 30 paragraph 2 BankA states that, as a restructuring measure, the assets of the affected bank may be transferred to a bridge bank or the bank may combine with another legal entity. The aim is to continue at least some banking services.

These restructuring measures could be carried out instead of or after a bail-in. However, their applicability is limited by various factors, which will now be illustrated, drawing in particular on the example of Credit Suisse.

13.1.5.2 Credit Suisse case

The question arises as to whether a combination between Credit Suisse and another bank could have been undertaken based on the TBTF rules in the BankA.

When the above-mentioned restructuring measures were drawn up (in particular in the case of a combination or takeover), the main example in mind was a combination involving several interconnected legal entities (e.g. Raiffeisen Group).[258] The restructuring procedure would be opened for all group entities and the restructuring plan could stipulate uniform rules for the combination, applying to all the legal entities concerned.

If, as in the case of UBS and Credit Suisse, a bank in need of restructuring is taken over by another bank, the consent of the shareholders of the acquiring bank must be obtained in accordance with the MergA. This consent could not be bypassed by a restructuring ruling.

Consequently, without the Federal Council emergency ordinance of 16 March 2023,[259] the takeover of Credit Suisse in a restructuring would have had to be carried out under private law. In particular, a resolution of the Annual General Meeting of UBS Group AG would have been required, and various audited documents would have had to be drawn up.[260] A longer preparatory phase and public disclosure of the plans would have been necessary to implement such a merger. The announcement of the merger might have helped to stabilise Credit Suisse to some degree. However, the Annual General Meeting of UBS Group AG could not have been guaranteed to approve the merger. Failure to do so would probably have led to further destabilisation of Credit Suisse and thus represented another significant risk.

There would also have been other operational obstacles. For example, a consideration in accordance with Article 31c BankA would have had to be drawn up promptly (probably with the involvement of an impartial third party) and the immediate legal effectiveness of the transfer under foreign law (in particular change of control authorisations and competition law) would have been questionable.

[258] BBl **2020** 6359, p. 6385

[259] SR **952.3**

[260] Art. 12 ff. MergA

13.1.6 Orderly wind-down

13.1.6.1 Description

"Orderly wind-down" is not defined in the Act and is therefore not explicitly regulated. The term refers to the restructuring of a SIB using specific restructuring instruments, such as a bail-in, with the aim of maintaining the systemically important functions only temporarily and winding them down without jeopardising system stability. The non-systemically important functions, on the other hand, are liquidated as quickly as possible, i.e. either discontinued or (wholly or partly) sold, as part of the implementation of the restructuring plan. The continuation of the banking group as a whole is not the aim of an orderly wind-down. Rather, the idea behind this resolution strategy is that even a SIB should not be artificially maintained if it is not viable on the free market. Instead, it should be able to exit the market in an orderly manner so as not to jeopardise financial stability.

As previously noted, orderly wind-down is not a single restructuring measure, but rather a resolution strategy that can be implemented with the aid of various measures. For example, it is conceivable that a bail-in could be ordered as part of an orderly wind-down, not with the purpose of restoring the bank's capital base for the indefinite continuation of the group but rather to ensure a sufficient capital base for the resolution, which might take several years. Instead of a bail-in, the orderly wind-down could also be accompanied by a transfer of certain assets and liabilities to a transferee or a bridge bank. The specific measures required to achieve the objective of an orderly wind-down are to be determined on a case-by-case basis.

Given the temporary continuation of systemically important functions, orderly wind-down must be clearly distinguished from bankruptcy. Bankruptcy involves mandatory withdrawal of the licence[261] and thus also excludes the temporary continuation of, for example, systemically important banking services. A bank that has been declared bankrupt must cease its business activities immediately. In the case of a SIB, this would jeopardise financial stability and should therefore be avoided. By contrast, orderly wind-down as a variant of the restructuring procedure can safeguard financial stability while also enabling the orderly market exit of a bank that is no longer viable.

13.1.6.2 Credit Suisse case

In the case of Credit Suisse, orderly wind-down would have been a possible follow-up scenario to the restructuring option if this had failed. However, orderly wind-down in this scenario would have entailed significant risks to financial stability and taxpayers (e.g. the level of the PLB), all the more so as orderly wind-down is not expressly regulated as such by law and was therefore not prepared in advance as a resolution strategy. Accordingly, there were major uncertainties regarding the impact of this strategy as well as legal uncertainties that could have further jeopardised its implementation.

13.1.7 Emergency planning

13.1.7.1 Aim of emergency planning

Through their emergency plans, the SIBs demonstrate that their systemically important functions can be continued in a crisis (Art. 9 para. 2 let. d BankA and Art. 60–63 BankO). These systemically important functions have been largely outsourced by the G-SIBs to their Swiss subsidiaries (Credit Suisse Schweiz AG and UBS Switzerland AG). Consequently, the emergency plans for the G-SIBs do not relate to the group as a whole, but focus on their Swiss entities.

The global resolution plan drawn up by FINMA for a G-SIB provides for restructuring via SPoE bail-in as the primary strategy (see section 13.1.3). The emergency plan is part of the secondary strategy, which comes into play if a bail-in was not successful or cannot be carried out. In this case, the group would be broken up, the individual group companies would be resolved and the emergency plan to protect the functions that are systemically important for Switzerland would be triggered. The Swiss emergency plan is thus a component of the resolution plan for the G-SIB.

[261] Art. 33 para. 1 BankA

The aim of the emergency plan is to be able to continue to operate the Swiss entity during the crisis, independently of the other group companies that need to be resolved. The emergency plans of UBS (and previously Credit Suisse) must therefore show how the dependencies of the Swiss entities on the respective parent company and the rest of the group can be reduced or eliminated, preferably before a crisis occurs.

Unlike a G-SIB, the three SIBs that are not internationally active have minimal, if any, international connections. For this reason, they do not have a resolution plan beyond the Swiss emergency plan. In fact, the emergency planning for these banks and FINMA's resolution planning largely overlap. SIBs that are not internationally active must set out both a primary and an alternative strategy in their emergency plans.

FINMA reviews the emergency plans annually based on the criteria in Article 61 BankO. These criteria cover, among other things, the capital and liquidity required for a resolution, including the associated scenario modelling, the developed restructuring measures including an alternative strategy, operational dependencies, financial interdependencies and the independence of the treasury department.

The feasibility assessment for an emergency plan focuses on technical and organisational implementation. Another factor assessed is whether there is enough capital and liquidity to deal with a specific stress scenario. However, emergency planning is not designed to ensure that the Swiss subsidiary is refinanceable in the long term or to cover the scenario of a prolonged bank run on the Swiss subsidiary after it has been split from the group.

At the end of 2022, the emergency plans of the G-SIBs and Raiffeisen were deemed by FINMA to be feasible. PostFinance must revise its emergency strategy due to the loss of the recapitalisation guarantee by the federal government. ZKB has still not reserved sufficient funds for recapitalisation in a crisis, although it has the corresponding capital. It can now also issue specific bail-in bonds in order to build up the required additional loss-absorbing capital (see section 13.1.4.7).

13.1.7.2 Impact in the Credit Suisse case and at the new UBS

Credit Suisse was not resolved, so the quality of the emergency plan cannot be assessed based on an actual case. Thanks to the preparations made over the past few years as part of the emergency planning, FINMA believes that it would be possible to technically separate the Swiss subsidiary from the rest of the group.[262] For example, access to financial market infrastructures would have been ensured, critical services could have continued to be provided from the subsidiary itself or from the service company specially established for this purpose, resolution clauses had been incorporated into all relevant contracts, and the subsidiary would have had sufficient capital and liquidity to comply with regulatory requirements.

Further insights were also gained during the specific preparatory work for triggering the emergency plan.

It transpired that the substantial liquidity outflows related not only to the parent bank and the foreign subsidiaries but also to the Swiss subsidiary. Since it must be assumed that these outflows would have continued immediately after the Swiss subsidiary had been separated, the liquidity reserves in the Swiss subsidiary would not have been sufficient. Accordingly, external liquidity would have been necessary for the successful implementation of the emergency plan, whether by means of ELA or a PLB.

There is a further question mark over the independent continuation of the subsidiary as such. Two main options envisaged in this regard are the sale of the subsidiary to another bank and an initial public offering (IPO). Both require a certain lead time, and their implementation is heavily dependent on the actual crisis scenario.

Another problem with triggering the emergency plan relates not to the Swiss subsidiary itself but to the rest of the group, in particular the parent bank. Assuming that the Swiss subsidiary will continue to operate after the emergency plan is triggered and the systemically important functions are thus safeguarded, the problem in this scenario is that the parent bank will be declared bankrupt. The parent bank has a banking licence from FINMA, holds the participations in subsidiaries in Switzerland and

[262] FINMA press release, FINMA assesses the recovery and resolution plans of systemically important institutions again, 26 April 2023

abroad, and performs its own banking activities (e.g. investment banking, asset management). The parent bank, with assets totalling CHF 378 billion, was significantly larger than the Swiss subsidiary with CHF 215 billion (as at Q4 2022). In addition, the financial interdependencies within the group ran largely via the parent bank in its capacity as central treasury (see also section 14.1.3). Bankruptcy of the parent bank could therefore have threatened Switzerland's financial stability.

13.1.8 Resolution strategy: single point of entry vs. multiple point of entry

The choice of resolution approach depends in particular on the bank's organisational structure and business model.[263] For G-SIBs with a centralised structure, an SPoE approach is usually chosen. However, for G-SIBs with a more decentralised structure, the multiple point of entry (MPoE) approach is more likely. With most G-SIBs, the competent national authorities (home supervisory authorities) adopt an SPoE approach. Currently, only the business models of British bank HSBC and Spanish bank Santander are set up for an MPoE approach.

FINMA has set SPoE bail-in as the primary resolution strategy for the G-SIBs. This involves carrying out a bail-in at the level of the group holding company to recapitalise the entire group. Factors that particularly lend themselves to this approach are the group structure of the Swiss G-SIBs, which include a group holding company, and the fact that the bail-in bonds are issued at the level of this company.

With G-SIBs, the SPoE approach has the advantage that the home supervisory authority can carry out a uniform restructuring procedure across the entire group. However, an SPoE strategy requires particularly close cooperation between the supervisory authorities, both in advance of and during a restructuring. The Credit Suisse crisis highlighted the importance of this cooperation between FINMA and foreign supervisory authorities. In the run-up to the Credit Suisse rescue, the most important of these supervisors issued national liquidity requirements for local group entities of Credit Suisse. This led to a restriction of liquidity flows within the group, which exacerbated the already strained liquidity situation.

Another problem with the SPoE approach is the requirement for restructuring measures to be recognised by foreign supervisory authorities. Carrying out a cross-border bail-in involves considerable complexity and a multiplicity of legal hurdles (see section 13.3.5).

An alternative resolution strategy to SPoE is the MPoE approach. Here, a restructuring procedure is not initiated via a single group entity only. Instead, a separate resolution strategy is defined and implemented for each group entity by the relevant national supervisory authority in each case. As the subsidiaries and branches of a G-SIB are located in a number of different jurisdictions, the respective resolution strategies must be tailored to these jurisdictions and implemented by their competent resolution authorities. This involves a considerable amount of coordination.

With an MPoE approach, ring-fencing takes place ex ante. The MPoE approach requires that each group entity be responsible for its own capital and liquidity management. This is not the case with UBS's group structure, as it has a parent bank that is responsible for the centralised distribution of capital and liquidity within the group. To switch to the MPoE approach for UBS, it would be necessary to introduce a flat holding structure without a parent bank. This would remove the benefit of having a parent bank managing liquidity centrally for the whole group, and a structure with intermediate holding companies (IHCs) between the group holding company and the individual subsidiaries would have to be created. The home supervisory authorities could carry out their restructuring measures at IHC level. UBS has already implemented such a structure in the USA due to local requirements (see Figure 9).

13.1.9 Crisis Management Groups

According to the FSB Key Attributes,[264] home supervisory authorities must set up Crisis Management Groups (CMGs) for their G-SIBs. The purpose and composition of the CMGs are specified in the Key Attributes. The FSB has also published a non-binding recommendation for the implementation of CMGs in practice.[265] These state that the CMGs should regularly review a bank's progress with regard to resolvability and report to the FSB. To this end,

[263] Carrascosa, How to adapt a bank for MPE resolution strategy, Risk.net, 4 July 2019

[264] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014

[265] FSB, Good Practices for Crisis Management Groups, 30 November 2021

the recovery and resolution strategies and plans are discussed and a shared understanding is established. The aim is to step up and enhance cooperation between authorities through regular exchange of information and experience. The home supervisory authority takes the lead. The main authorities of relevance to UBS (and previously Credit Suisse) are those in the USA, the UK and the EU (the latter only in the case of UBS).

During the Credit Suisse crisis, virtual meetings with the US and UK regulators were held daily from the beginning of October 2022. From November, FINMA also stepped up cooperation within the CMG, bringing on board those authorities involved in resolution. The goal was to share information, discuss possible measures and create legal certainty by launching recognition procedures. These procedures are intended to ensure that resolution measures ordered by a home supervisory authority can be recognised and enforced in the relevant jurisdictions (e.g. the write-down of instruments issued abroad that would be converted into equity in the event of a bail-in).

13.1.10 TPO

13.1.10.1 Description

Temporary public ownership (TPO) is the temporary full or partial state ownership of a financial institution or individual entities thereof (in particular those with systemically important functions), as a subsidiary and essential "ultima ratio" measure in the interests of financial stability and the economy. TPO is thus intended as a last resort that may be adopted if the application of restructuring measures (especially a bail-in) is not sufficient to implement the restructuring or emergency plan strategy and hence to stabilise the financial institution.[266] The TPO may be accompanied by liquidity support if necessary, whether by means of ELA or a PLB.

The purpose of TPO as understood here can be illustrated using the example of the continuation of systemically important functions at a Swiss G-SIB. If a restructuring of the group is not possible or if the restructuring is unsuccessful, this will lead to the bankruptcy of the parent bank and the spin-off of the Swiss subsidiary bank, according to the emergency plan. It may not be possible to sell this subsidiary bank at short notice. To prevent a bank run at the subsidiary bank, TPO of the Swiss subsidiary, possibly in conjunction with a PLB, could be used to bolster financial stability, thereby buying time to find a solution for the Swiss subsidiary.

TPO should be distinguished from other government instruments, in particular a state guarantee for certain debts of a financial institution, the subscription of debt instruments, and partial participation through the acquisition of newly issued shares. While such instruments exist in some jurisdictions (e.g. partial participation in the EU), they are not provided for in any international standard.

13.1.10.2 Application in the Credit Suisse case

A temporary nationalisation of Credit Suisse was not at the forefront during the preparatory work for regulatory and legal reasons, as well as due to risk considerations. The option was not pursued as a priority in view of the possibility of a private takeover. However, had a private takeover not been possible, TPO would have been one of two remaining options alongside restructuring.

In the case of Credit Suisse, TPO would have had to be considered either for the entire group or as a temporary measure for the Swiss subsidiary following the bankruptcy of the parent bank. Had the federal government taken over Credit Suisse, it would have had to assume all of the bank's risks and its management. Particularly in view of the size of the new UBS's balance sheet, TPO would entail enormous risks for the state in the future. Any TPO would therefore have to be limited to the systemically important functions of the Swiss subsidiary. This is also recommended by the Expert Group on Banking Stability.[267] However, this assumes that there is a functioning resolution plan for the residual bank, particularly the parent bank (see section 13.4.2).

13.1.10.3 Legal and technical issues

TPO raises numerous legal and technical questions. For example, it would have to be examined whether such a solution is permissible from a constitutional point of view. However, many issues would also need to be clarified at the legislative level. Thus, any TPO design would throw up a raft of technical issues that would have to be examined in depth as part of any further work. These include, for example, the question of who would have to bear losses prior to the TPO (especially as regards share capital, AT1

[266] Conceptually, TPO requires shareholders and creditors to share in the losses (for the European context, see BRRD 58)

[267] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023

instruments and bail-in bonds).[268] There is also the question of the valuation of the entity to be acquired and the associated compensation for the existing owners. Further issues concern, for example, exit strategies, integration of the bank into the Federal Administration and management of the acquired bank.

13.1.11 Resolution fund

13.1.11.1 Description

A resolution fund is intended to ensure that, in the event of a crisis, there are sufficient resources to actually apply the resolution measures. In principle, this may involve both liquidity assistance and capital measures. Such a fund may, but does not have to, simultaneously serve as a funding source for deposit insurance or a public liquidity backstop by the federal government. In principle, it can be financed ex ante or ex post and either by the financial institutions themselves or (in whole or in part) by state guarantees. Unlike other jurisdictions such as the USA and the EU, Switzerland does not have a resolution fund.

13.1.11.2 Impact in the Credit Suisse case

Depending on its design and volume, a resolution fund could have supported the implementation of the available options (merger with UBS, restructuring, TPO). For example, the government's CHF 9 billion loss protection guarantee to UBS could have been provided by the resolution fund. On the other hand, the size of the PLB guarantee was far greater than the possible volume of such a fund in Switzerland.

13.2 International comparison

13.2.1 Bail-in

Bail-in has become established not only in Switzerland but also internationally as a restructuring measure for G-SIBs. The FSB, for example, describes bail-in as a core element of an effective resolution regime.[269] This is one reason why it has established itself as a standard method for rescuing a G-SIBs in the EU, the UK and the USA.

As part of the resolution strategy pursued by FINMA, the aim of a bail-in is to restore the capital base of the affected bank so that, as far as possible, the entire banking group can continue to operate without interruption. This form of bail-in, which is provided for in Switzerland and in the EU, aims to ensure the continued operation of the bank and is also referred to as an "open bank" bail-in.

The counterpart to the open bank bail-in is the "closed bank" bail-in, which is particularly favoured in the USA. In contrast to the Swiss approach, no creditors' claims are converted into share capital. Instead, the US authorities use asset transfer to force creditors to bear losses.

In a closed bank bail-in under the US approach, the majority of the assets (in the case of holding companies, this primarily relates to shares in the operating subsidiaries) and certain liabilities of the bank to be restructured are usually transferred to an acquiring bridge holding company. The subsidiaries whose shares are transferred are not directly affected by the intervention and continue to operate without interruption. The transferring bank is then liquidated. As part of the liquidation, shares in the bridge holding company may be allocated to the remaining shareholders and creditors. In this sense, the closed bank bail-in leads to a similar outcome to the open bank bail-in as far as the affected creditors are concerned.

Implementation of the open bank bail-in differs in certain respects between Switzerland and the EU. A key difference is that Swiss regulations require the share capital to be completely written down before a bail-in can take place (Art. 30*b* para. 5 let. b BankA), whereas in a bail-in under EU law, as long as the bank still has a positive net value, no write-down would occur, so the shareholders of the bank to be restructured would keep their shares.

[268] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, recommends temporary nationalisation as a going concern, i.e. after write-down of share capital and AT1 instruments, but without write-down or conversion of bail-in bonds

[269] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, p. 9

However, because the share capital is increased as a result of the bail-in, the percentage participation of the existing shareholders decreases. According to EU law, it must be ensured that the bail-in "severely dilutes" the shareholdings of the original shareholders (Art. 47 para. 1 let. b BRRD).

EU regulations also include requirements for the issuance of bail-in bonds. As explained above, the Swiss G-SIBs expressly designate their bail-in bonds as "non-subordinated" on the basis of "structural subordination" (see section 13.1.4.6). Under the Bank Recovery and Resolution Directive (BRRD), however, EU banks must expressly designate bail-in bonds as "non-preferred". For this reason, the corresponding debt instruments in the EU are issued as "senior non-preferred bonds". This leads to enhanced transparency and thus also to investors being able to clearly distinguish between bail-in bonds and senior debt instruments. It should be noted that the USA and UK, like Switzerland, have no such regulation and G-SIBs there also issue their bail-in bonds as "non-subordinated".

Another difference compared with EU law is the (lack of) alignment of the bail-in hierarchy with the insolvency hierarchy. Swiss law provides for a special bail-in hierarchy (Art. 30*b* para. 7 BankA), which differs from the hierarchy under insolvency law. In particular, bail-in bonds are converted before the other third-class claims (although the exemption under Art. 30*b* para. 8 applies here, see section 13.1.4.6 above). In addition, the uninsured deposits are privileged over the other claims in the bail-in. Finally, FINMA can now also exempt trade receivables from the bail-in (Art. 30*b* para. 4 BankA).

The difference in treatment between restructuring and insolvency proceedings in Swiss law could create difficulties, particularly in connection with the "no creditor worse off" (NCWO) principle. The internationally recognised NCWO principle is also enshrined in Swiss law (Art. 30*c* para. 1 let. b BankA). It states that creditors must not be likely to be in a worse financial position in a restructuring procedure than they would be if the bank was immediately declared bankrupt. Insofar as certain claims are disadvantaged in a bail-in compared with insolvency proceedings, this could make complying with the NCWO requirement more difficult. This is one reason why, for example, EU law, in the BRRD, stipulates that the bail-in hierarchy follows the hierarchy applying in insolvency proceedings (Art. 48 para. 1 let. d and e BRRD).

13.2.2 TPO

13.2.2.1 Legislative comparison

The FSB Key Attributes[270] provide for the possibility of TPO as a subsidiary measure to maintain financial stability, thereby allowing critical functions to continue while a permanent solution is sought (e.g. sale or merger with a private company). The implementation of such an instrument should be accompanied by measures to ensure that any losses incurred by the state are passed on to the bank's unsecured creditors or the wider financial sector. Unlike other measures set out in the Key Attributes, TPO is not the subject of an actual recommendation, but is listed as an option to be examined by the individual countries. In a peer review from 2016, the FSB notes that 14 countries have enshrined TPO in law.[271]

The USA has not explicitly incorporated TPO into its legal system. However, the Federal Deposit Insurance Corporation (FDIC) has extensive powers in relation to bank resolution. When a bank is deemed insolvent or illiquid, or the Department of the Treasury sees the need to intervene, the FDIC can take control of an institution as an appointed receiver and discharge the following tasks:

- ensuring access to insured deposits;
- taking control of the bank's operations, including freezing payments and removing management. The bank is run as a bridge bank, and the FDIC can make funds available to maintain operations;
- initiating an asset sale to cover losses. Asset sales can take the form of auctions, negotiated sales to larger banks or government packages.

If the bank in resolution or the bridge bank formed for this purpose is not in a position to finance itself independently on the market, liquidity may be provided via a resolution fund called the Orderly Liquidation Fund or OLF (see section 10.2). The OLF is a fund at the US Treasury, which the FDIC can draw on for the liquidity required for resolution. OLF funding is limited and must be repaid in

[270] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014

[271] FSB, Second Thematic Review on Resolution Regimes, Peer Review Report, 18 March 2016

full out of the proceeds from the sale of the bank's assets. Failing this, the costs can be passed on to other financial companies.

The EU provides for public equity support (Art. 57 BRRD) and TPO (Art. 58 BRRD) as government financial stabilisation tools. However, their introduction into national law is left to the individual member states. In order for these tools to be used, they must serve to maintain financial stability and all resolution tools must have been exhausted. The two government financial stabilisation tools can be applied both to entities performing critical functions and to the parent holding companies. In both cases, the bank is to be transferred to the private sector as soon as circumstances allow.

In the UK, the Banking Act explicitly provides for TPO,[272] its application being supplemented by implementing provisions in the code of practice.[273] TPO is applicable to actual banks and to the top holding company. The Treasury is responsible for TPO, and the Bank of England for the other stabilisation options. As preconditions, the financial stability of the UK must be threatened, the other stabilisation options must have been exhausted, and the creditors and shareholders must have made a contribution to loss absorption and recapitalisation. Also stipulated are how the bank is to be held and managed during TPO, how it is to be sold and how the parties involved in TPO are to be compensated.

13.2.2.2 Real-life cases

The German state supported Commerzbank with around EUR 18.2 billion of taxpayers' money during the 2007-08 financial crisis, when the bank took over the ailing Dresdner Bank. Commerzbank has repaid the state aid, but the German state remains the largest single shareholder, with a stake of 15.6%. Based on the share price at the end of 2022, the loss on the state's investment is around EUR 3.5 billion.[274]

The British bank Northern Rock was taken into temporary state ownership and management in February 2008, following a bank run. The takeover followed two failed attempts to sell the bank privately. In 2012, part of the bank was sold to another bank, Virgin Money, for around GBP 1 billion, and in 2017 most of the remaining state-owned assets were sold, meaning that altogether the entire state investment (approximately GBP 37 billion) was recouped. Indeed, it is calculated that the state made a profit of around GBP 4.7 billion.[275]

In 2008 and 2009, the UK government provided GBP 45.5 billion to rescue Royal Bank of Scotland, in which it acquired an 84% stake. In October 2021, the loss to the UK Treasury was estimated at GBP 35 billion, although this is not yet a final valuation.[276] As at May 2023, the state still held a 39% stake in NatWest Group (formerly Royal Bank of Scotland).[277]

In Ireland, the total losses due to state participations in five banks in 2008 are estimated at EUR 45.7 billion, equivalent to almost 30% of its GDP at that time.[278]

13.2.3 Resolution fund

An international comparison of government liquidity support can be found in section 10.2. Deposit insurance is compared in section 11.2.

The FSB Key Attributes[279] stipulate that jurisdictions should implement privately financed deposit insurance or resolution funds, or a funding mechanism with ex post recovery from the finance industry of financial assistance to facilitate bank resolution (Key Attribute 6). Any state financial aid should only be possible subject to strict conditions. In particular, the intervention must be necessary to ensure financial stability and all private funding options must have been ruled out. Also, shareholders and creditors must have borne substantial losses.

272 UK, The stabilisation options, Banking Act 2009, 21 December 2018, Chapter 3
273 HM Treasury, Banking Act 2009: special resolution regime code of practice, December 2020
274 Deutscher Bundestag, Staatliche Hilfen für die Commerzbank AG, 22 March 2023
275 Arnold, Northern Rock investors accuse Treasury of profiting from bailout, Financial Times, 31 August 2017
276 Office for Budget Responsibility, Economic and fiscal outlook, October 2021
277 See information on equity ownership statistics on the NatWest Group website at: https://investors.natwestgroup.com/share-data/equity-ownership-statistics.aspx
278 Brennan, Net cost of Irish banks bailout rises to €45.7bn, comptroller says, article in The Irish Times, 30 September 2022
279 FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014

The EU has established a Single Resolution Fund (SRF) as part of its Single Resolution Mechanism (SRM).[280] The SRF serves to ensure the effective application of resolution measures. It can be used for both liquidity assistance and capital measures (granting loans or purchasing assets). The SRF is financed by ex ante contributions from banks from the 19 member states of the Banking Union, with funding amounting to at least 1% of covered deposits by the end of 2023. The banks have funded the SRF to the tune of EUR 77.6 billion in total.[281]

On 4 December 2018, the EU finance ministers agreed to introduce a backstop for bank resolution within the Banking Union.[282] In addition, the European Stability Mechanism (ESM) is to provide a backstop amounting to an additional EUR 68 billion. The banking sector would then have to repay the loan through ex post contributions.

In the UK, the Resolution Liquidity Framework provides tools for supplying liquidity to banks that are in resolution. As a public sector backstop, the Treasury can authorise support measures from the Bank of England (BoE) that go beyond the ordinary facilities.[283] In essence, therefore, the UK's public sector backstop consists of liquidity support from the BoE, which is authorised and guaranteed by the state. In which situations this liquidity support would be granted, and on what terms, is not publicly disclosed.

For the situation in the USA, see section 13.2.2.

13.3 Assessment

13.3.1 Bail-in tool

In the wake of the 2007-08 financial crisis, bail-in established itself as a restructuring tool for SIBs, not only in Switzerland but also internationally. The greater the likelihood of a successful bail-in and thus restructuring, the more likely it is that a SIB will not need to be bailed out by the state. This reduces the implicit state guarantee and the associated moral hazard. Current estimates suggest that SIBs worldwide are still benefiting from an implicit state guarantee.[284]

The international community, the relevant supervisory authorities and the banks concerned have taken extensive preparatory measures in recent years with the aim of positioning bail-in as a credible restructuring tool. However, a bail-in has never yet been carried out on a G-SIB.

In the Credit Suisse case, a bail-in was prepared but not implemented. Nonetheless, the Credit Suisse case can offer insights into possible opportunities for improvement:

- Firstly, a bail-in has no substantial impact on the liquidity situation of the bank concerned and is therefore not, by itself, sufficient to improve it.
- In a loss-of-confidence scenario, it remains unclear to what extent a bail-in – in conjunction with a repositioning of the business model and interventions in corporate governance – would be effective at creating the necessary confidence among market participants. This is particularly true if the loss of confidence is not primarily due to a loss of capital.
- Bail-in is fraught with legal uncertainties:
  - In jurisdictions, national requirements for registering shares are not geared towards an open bank bail-in (the "SEC issue").
  - With any bail-in, it can be assumed that the groups incurring losses will question the necessity of a bail-in by means of legal challenges. This is particularly true if the bail-in not only restores the core capital but

[280] Single Resolution Board, The Single Resolution Fund, 28 June 2021

[281] Single Resolution Board press release, Single Resolution Fund grows by €11.3 billion to reach €77.6 billion, 6 July 2023

[282] Council of the European Union, Terms of reference of the common backstop to the Single Resolution Fund, 4 December 2018

[283] Bank of England, The Bank of England's approach to resolution, October 2017, p. 22

[284] See, for example, the following studies: Allenspach, Reichmann and Rodriguez-Martin, Are Banks still "Too Big to Fail"? - A market perspective, SNB Working Paper 18/2021, October 2021; IMF, Moving from Liquidity- to Growth-Driven Markets, Global Financial Stability Report, April 2014, pp. 101–132

increases it above and beyond the regulatory requirements, which is likely to be necessary for successful restructuring in most crises.
- The legal provisions on the bail-in hierarchy and the issuing practices of the G-SIBs are complex.
- Implementing any value adjustment in favour of the existing shareholders' written-down capital would be difficult in practice.

– The authorities have considerable leeway in terms of when to intervene and the choice of appropriate measures. Although in practice, in the case of a SIB, the SNB (liquidity) and possibly the Federal Council (PLB) would usually be involved in such a decision, by law the responsibility lies with FINMA alone.

13.3.2 Asset transfer and merger

The restructuring measures of asset transfer or merger can be successfully applied only in selected situations. In the case of Credit Suisse, the conditions for carrying out a restructuring procedure would have been met, but this did not apply to UBS. The restructuring provisions under banking law would not have been sufficient to carry out the merger in a timely manner. To avoid having to wait for UBS's required consent, it was necessary to override the Mergers Act with emergency legislation (see section 5.3). However, this does not alter the fact that an asset transfer or merger could certainly be applied in other cases. The existing legal basis therefore continues to fulfil its purpose.

Furthermore, amending the law so that uninvolved banks could be obliged to take over a bank in need of restructuring seems neither a viable nor a desirable option. This would constitute an exceptional level of interference in the autonomy and economic freedom of uninvolved third-party banks.

Moreover, if UBS were to find itself in a crisis, a merger would likely only be possible with a foreign acquiring bank, as there are no banks in Switzerland that could take over a bank of UBS's size. Any operational obstacles to this, such as prompt valuation of the entity to be disposed of or the immediate legal effectiveness of the transfer under foreign law, could not be removed by amending the law here in Switzerland.

13.3.3 Orderly wind-down

In a free market economy, it must be possible for a market participant that is no longer profitable to exit the market. If it is no longer possible for a SIB to continue its business activities, an orderly wind-down must be a viable alternative to the previously prepared resolution strategy or to bankruptcy liquidation.

The lack of an explicit legal framework for orderly wind-down creates legal uncertainty and makes its application more difficult. Amendments to the BankA would therefore be desirable to strengthen the orderly wind-down tool:

– The objectives of the restructuring procedure could be diversified. Currently, the restructuring procedure is essentially geared towards ensuring that the bank complies with the licensing requirements and the other statutory provisions again after it has been restructured (Art. 29 BankA). This is not essential in the event of an orderly wind-down, as the bank concerned will be exiting the market.

– Orderly wind-down may conflict with the general principle of equal treatment of creditors in bank restructuring proceedings.[285] This is particularly linked to the fact that an orderly wind-down involves temporarily maintaining a bank's systemically important functions but not its non-systemically important functions. Maintaining systemically important functions could lead to creditors of these functions receiving more favourable treatment, for example if these functions are sold to an acquiring bank. However, this issue should not jeopardise the implementation of an orderly wind-down in accordance with the applicable legal provisions. This should be duly set out in the Act, which could, in particular, stipulate how any creditors in a worse position would be compensated.

– Limitations on the principle of equal treatment of creditors are not unknown in restructuring law. For example, a specific creditor hierarchy is stipulated for converting creditors' claims in the case of bail-in.[286] However, the law does not provide for express exceptions in the case of orderly wind-down and for the overarching goal of financial stability. The legal uncertainties in the event

[285] Art. 30c para. 1 let. c BankA

[286] Art. 30*b* para. 7 BankA

that deviations from the principle of equal treatment of creditors would be necessary in the context of an orderly wind-down should be eliminated by statutory provisions.

– As noted above, an orderly wind-down could also be implemented in conjunction with a bail-in. A bail-in would create the capital base needed for the resolution procedure, e.g. the sale of certain entities of the banking group. However, particularly with a bail-in this could give rise to uncertainties, as the basic aim of a bail-in is to restore the regulatory capital, whereas an orderly wind-down might require the capital base to be increased well beyond that level. It might make sense for legislators to set parameters to help eliminate these uncertainties.

13.3.4 Emergency plan

Emergency planning aims to ensure the continuation of systemically important functions (objective two of the TBTF regime, see section 2.2). The parent banks do not contain any systemically important functions and are therefore not included in emergency planning. However, due to their size alone, their failure would very likely endanger financial stability and thus jeopardise the first objective of the TBTF regime.

Currently, FINMA assesses *global* resolvability (Art. 65*a* and 65*b* BankO) on the basis of certain criteria (e.g. organisational structure, operational continuity) and can stipulate additional loss-absorbing funds or a liquidity surcharge. In addition, the bank must submit the information for the resolution plan to FINMA (Art. 64 para.2 BankO). These requirements, aimed at ensuring the group's resolvability, are significantly less stringent than the emergency plan. Accordingly, although the parent banks are included in the global resolution plan as part of the primary resolution strategy (SPoE bail-in), FINMA cannot take any far-reaching measures to improve their resolvability. Consequently, the secondary resolution strategy envisages only the direct bankruptcy of the parent banks and not their resolution.

As the parent banks do not contain any systemically important functions, they would also not have to be continued, in line with the emergency planning. Instead, it would be necessary to ensure that parent banks could be wound down over a certain period (e.g. one to two years) to the extent that they no longer posed a threat to financial stability. The existence of a strategy for the residual bank would also enhance the feasibility of the emergency plan.

13.3.5 Single point of entry vs. multiple point of entry

On the one hand, an MPoE strategy is more in line with the expected behaviour of host supervisory authorities in a crisis (i.e. ring-fencing) and seems fundamentally more suitable for a small country with a very large G-SIB that conducts a significant portion of its business abroad. In addition, with an MPoE approach, the home supervisory authority is less reliant on recognition decisions by foreign supervisors.

On the other hand, with an MPoE strategy, parallel restructuring procedures in different jurisdictions could lead to complex coordination problems. In addition, local ring-fencing occurs by definition and intragroup liquidity flows are interrupted. There is also a risk that an authority will carry out a local resolution on its own, thereby triggering the break-up of the group.

In the case of UBS, implementing an MPoE strategy would also require a fundamental restructuring of the group, from a centralised to a decentralised structure. In particular, the centralised function performed by the parent bank for all subsidiaries is not compatible with an MPoE approach.

13.3.6 Crisis Management Group

A functioning CMG is an important element in the crisis management of a G-SIB. In the case of Credit Suisse, the early involvement of the CMG created transparency about the situation and FINMA's recovery and resolution planning, thereby ensuring a good understanding and support for the proposed crisis measures and enabling the preparation of a bail-in.

13.3.7 TPO
Swiss law does not provide for a TPO tool. Although the international FSB standard mentions TPO as a possible resolution tool, unlike for the other instruments it does not make a clear recommendation to the individual countries about whether or not to introduce it. A TPO tool has been explicitly introduced in the UK and at EU level, although in the EU only around half of members had adopted it into national law at the time of publication of this report.

TPO is conceivable either for an entire financial group or, in the case of a G-SIB, as a temporary measure for the Swiss subsidiary following the bankruptcy of the parent bank. As the new UBS Group AG has a balance sheet around twice the size of Switzerland's GDP, a temporary public takeover would entail enormous risks for the state. Any TPO would therefore have to be limited to the Swiss subsidiary. However, this seems problematic for a large, internationally active bank due to the expectations of foreign authorities regarding the restructuring of the group and possible global contagion effects.

13.3.8 Resolution fund
A resolution fund would have the advantage of reducing risks to taxpayers if it were to be funded by financial institutions. In addition, the funds would be available immediately when needed. However, a fund solution can only be considered in a fragmented market if a sufficient number of similarly sized depositors hedge a risk.

The Swiss banking market is highly concentrated, and even more so since the takeover of Credit Suisse by UBS. To enable a rescue of UBS, the other banks would have to pay disproportionately high contributions into the system, or UBS would effectively have to insure itself.[287] At the same time, such high contributions would withdraw capital from the banks and thus weaken their resilience and lending capacity. A sufficiently large, privately financed fund solution is therefore hardly realistic, meaning that a state insurance mechanism would be necessary. This in turn entails risks for the state and could create false incentives.

The same arguments apply to using funds from deposit insurance for resolution financing. In addition, the funds available for deposit insurance are already limited when viewed against their actual intended purpose.

13.4 Possible measures

The following sections discuss the range of possible measures in the area of resolution. These can each be assessed by weighing up their individual advantages and disadvantages. The measures in the thematic area are also assessed as a whole due to their interdependencies. At the end of the chapter, section 13.4.7 presents conclusions and proposes a specific mix of measures.

13.4.1 Expand resolution options
To date, a preferred resolution strategy (restructuring with SPoE bail-in) and, as a fall-back option, bankruptcy liquidation with triggering of the emergency plan have been prepared for G-SIBs (see section 13.1.3). One possible measure is to provide for and prepare more – and more flexible – resolution strategies and tools in the event of a future crisis, because an SPoE bail-in with the aim of continuing the bank as a going concern is not necessarily the most suitable resolution strategy in all crisis scenarios.

To further enhance their practicability, these resolution strategies could be tested even more rigorously in advance. These exercises could also include and test interaction between authorities. In addition to the extended preparatory work by FINMA, this would also require legal adjustments, in particular to create the conditions for an "orderly wind-down", i.e. a restructuring with the intention of resolving the bank (or parts of it) over a period of approximately one to two years.

13.4.2 Resolution plan for parent bank
As a possible measure, internationally active SIBs could in future be required to prepare a resolution plan for their parent bank. In it, they would have to show how the parent bank could be resolved over a period of one to two years without jeopardising financial stability. Currently, only UBS would be affected by such a requirement.

[287] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023

As with the emergency plan, the bank would have to prove, in the parent bank resolution plan, that the financial and organisational interdependencies do not represent an obstacle to resolution. This could also ensure a central clean holding company for the resolution. In addition, criteria for FINMA's review of the resolution plan would need to be stipulated (along the lines of Art. 61 BankO) and FINMA would need to be given the ability to take certain measures (along the lines of Art. 62 BankO), such as splitting off the investment bank, if deficiencies in the plan were not remedied.

13.4.3 Adaptation of the single point of entry strategy

Another possible measure is to switch from an SPoE strategy to an MPoE strategy.

As switching from an SPoE to an MPoE resolution strategy would involve structural adjustments to the bank and different regulatory treatment of the subsidiaries, it could not be done only in the actual event of a crisis. Rather, the option would have to be decided upon and prepared ex ante, and UBS would have to, for example, abandon its centralised structure (e.g. the global treasury) in favour of a more decentralised alternative.

It should be noted that the already very strict local requirements for subsidiaries are already a first step towards local independence of the subsidiaries and thus towards an MPoE approach. A hybrid approach combining aspects of MPoE and SPoE would also be conceivable.

13.4.4 Further enhancement of legal certainty in the event of a bail-in

In the Credit Suisse case, the restructuring option was ready for implementation. The insights gained from the preparation regarding remaining technical uncertainties in bail-in implementation could be used to further enhance the legal certainty of a bail-in.

Under the Swiss TBTF regime, for example, efforts could be made to simplify and create more transparency with regard to bail-in bonds in the creditor hierarchy or to simplify the compensation mechanism for shareholders after a bail-in. In order to simplify the value adjustment, for example, the requirement for a complete write-down of share capital could be removed (rather than offering subsequent compensation).

There are potential obstacles to improving the legal certainty of a bail-in, which Switzerland could help to resolve internationally. These include, for example, the problem of the requirements under the US Securities Act concerning the registration of newly created shares following a bail-in. In addition, Switzerland could play an active role in the work of the FSB, e.g. to create more transparency about bail-in bond creditors in the secondary market, in efforts to operationalise a bail-in or on the issue of cross-border recognition of bail-in measures.

In principle, all the measures listed here are aimed at further enhancing the credibility of a restructuring, in particular a bail-in. The greater the likelihood of a successful restructuring, the more likely it is that a SIB will not need to be bailed out by the state. This reduces the implicit state guarantee and the associated moral hazard.

13.4.5 Explicitly provide for TPO in the legal system

As a possible measure, the TPO tool could be enshrined in ordinary law, as it is in the UK and EU. This would expand the crisis management toolkit. However, the risks and incentives associated with this measure would need to be considered.

In the case of UBS, a temporary takeover would entail enormous risks for the federal government, given the size of UBS's balance sheet. Consequently, any TPO would have to be confined to the entities housing systemically important functions. This is also recommended by the Expert Group on Banking Stability. The possibility of a TPO focusing on systemically important functions could be explicitly enshrined in the legal system as a tool of last resort ("ultima ratio").

This instrument would be applied on a subsidiary basis after all other resolution tools. In addition, a number of conditions would have to be met. In particular, shareholders and AT1 and bail-in bond investors would first have to absorb substantial losses and the tool would have to be suitable for safeguarding financial stability.

The Ammann et al. expert opinion also considers the introduction of temporary nationalisation, with the difference that bail-in bonds would not have to be converted beforehand. However, in view of the enormous risks that would be transferred to the federal government in such a case, TPO should be subsidiary to a bail-in.

In the event of the emergency plan being triggered, TPO could have a confidence-building effect in certain scenarios. For example, it could curb a bank run on a G-SIB subsidiary triggered by its links to the bankrupt parent bank. Temporary nationalisation could also buy additional time to sell certain business lines or wind them down in an orderly manner. This could prevent a hasty sale of assets on unfavourable terms.

However, explicitly enshrining TPO in law would entail substantial risks. These risks exist whether the TPO applies to the group or is limited to systemically important functions. Moreover, the limited TPO is problematic for an internationally active SIB due to the expectations of foreign authorities regarding the restructuring of the entire group and possible global contagion effects.

Furthermore, TPO as an explicit state instrument directly contradicts the third TBTF objective of avoiding state aid. If TPO gives rise to the expectation that certain creditors and customers will be protected in a crisis, this creates false incentives and leads to competitive advantages for the banks concerned. Any necessary compensation to be paid by the banks concerned in this context would scarcely be able to fully offset these false incentives. False incentives could also arise, for example, if knowledge of the existence of a TPO tool were to reduce the demands placed on the resolution plans (including emergency plans) and hence their quality.

If TPO is applied, the federal government assumes all of the bank's risks and is therefore exposed to very significant state liability risks. In this context, there is also a risk that the bank remains state-owned for a long time, as a clear strategy for exiting the commitment may be difficult to define (see section 13.2.2.2).

Further uncertainties and risks exist, for example, with regard to the operational integration of the bank into the Federal Administration and the appointment of members of the management bodies by the state. From a legal perspective, it would have to be clarified whether there is a constitutional basis for the statutory regulation of TPO.

13.4.6 Establishment of a resolution fund

The establishment of a resolution fund is a measure designed to better meet the financing requirements of a possible resolution. As the international comparison shows, a resolution fund can be designed in various ways. It would have to be determined whether such a fund is to be created from private or public resources, whether the funds are to be paid in ex ante or ex post, and what types of expenditure they could be used for (solvency and liquidity support, compensation for shareholders, etc.).

The interaction with deposit insurance and any public liquidity backstop for SIBs would also have to be defined. For a resolution fund to be effective in a crisis, it would need to be of a sufficient volume. Assuming a target of 1% of insured deposits, as in the EU, this would mean a fund volume of around CHF 5 billion. This would be much too small given the size of Switzerland's SIBs, and higher contributions from the banks would be needed. Furthermore, the Swiss banking market is highly concentrated with the new UBS which, given its size, would effectively be insuring itself. The Expert Group on Banking Stability's report does not contain a proposal for the creation of a resolution fund, while the Ammann et al. expert opinion explicitly rejects the idea.

13.4.7 Conclusion and proposed mix of measures regarding resolution

Resolvability sends out a signal that even a SIB can exit the market in the event of a crisis. This creates important incentives for the SIB's stakeholders and reduces distortions of competition. In particular, there must be no continued doubts about the resolvability of Switzerland's only remaining G-SIB. There is therefore a clear need for action in this area.

As the Credit Suisse crisis has made clear, the prospects of a prepared resolution strategy succeeding can be assessed differently depending on the crisis scenario. In addition, there are naturally considerable uncertainties and risks around resolution, especially since no G-SIB has ever undergone this process. However, it is clear that the more flexible and varied the strategies prepared, the more comprehensive the toolkit, and the more unambiguously the remaining obstacles are eliminated, the greater the chances of a successful resolution.

Accordingly, the resolution options and prepared variants should be expanded. This includes the clear enshrining of "orderly wind-down" in law as a restructuring option. As part of the expansion of resolution options, the existing SPoE strategy could also be adapted. This would not require any changes at the legal level as the existing legal framework already allows FINMA to incorporate options required for an MPoE approach into the resolution strategies. These legal adjustments will improve resolvability in a targeted way and make it suitable for a wider range of crisis scenarios.

The introduction of resolution plans for parent banks should also be implemented for internationally active SIBs. This will directly bolster the first TBTF objective, namely reducing risks to financial stability. In the case of UBS Group AG, preparing and implementing this resolution plan will be a big undertaking. However, since the existing emergency planning only covers the Swiss subsidiaries, a resolution plan for the parent bank will close a major gap in ensuring the resolvability of the group as a whole.

It is also important to address remaining uncertainties, risks and obstacles to resolution as effectively as possible, and in particular to increase the legal certainty surrounding bail-in.

In view of Switzerland's banking structure, with high market concentration and one G-SIB that is very large compared with the other banks, the resolution fund measure is not recommended for implementation.

Enshrining TPO in law is also not recommended for implementation. The resulting moral hazard and the associated risks clearly outweigh the possible benefits in a resolution.

14 Structural measures

14.1 Background

14.1.1 Introduction

In addition to measures designed to prevent a crisis, the TBTF regime includes the measures discussed above in the event that a crisis does occur, since the risk of SIB failure cannot be fully eliminated, at least not at reasonable cost for the banks concerned and the economy as a whole. These measures are intended to minimise the impacts of such a failure and enable an orderly exit from the market. One possible component of these consists of structural measures aimed at making it easier to resolve the bank by giving it an appropriate organisational structure. This chapter will highlight the possibilities and limitations of structural measures.

The Siegenthaler Expert Commission of 2010 already dealt with organisational measures, particularly in connection with the continuation of systemically important functions and the emergency plan. It noted that organisational measures constitute a significant encroachment on economic freedom and the guarantee of ownership and that the principle of subsidiarity should therefore apply. According to the Expert Commission, it is the task of the respective SIB to organise itself in such a way that the continuation of systemically important functions is guaranteed in the event of a crisis. However, if the bank cannot demonstrate the ability to continue the systemically important functions, the supervisory authority should order the necessary organisational measures.[288]

This principle is still fundamentally valid today. However, it must be viewed against the background that the structure of the two Swiss G-SIBs has changed significantly, from the time of the 2007-08 financial crisis until the Credit Suisse crisis, and again with the new UBS following the takeover of Credit Suisse. Whereas the Siegenthaler Expert Commission focused on defining and continuing systemically important functions through the introduction of emergency planning, today there is the additional problem of the parent bank structure as a potential obstacle to the implementation of emergency planning.

14.1.2 Experiences from the Credit Suisse crisis

The Credit Suisse crisis brought the topic of the group structure of Credit Suisse, and also of UBS, into sharp focus. The dual holding structure (with a group holding company and a parent bank, see Figure 7) makes resolution more complicated. In addition, under the current regulatory regime without participation deduction, it favours double leverage, which leads to a capital shortfall in the parent bank.[289]

The high valuation of the participations and the tight capitalisation of the parent bank were an obstacle to the implementation of Credit Suisse's strategic repositioning, as the foreign participations had to be revalued and heavily written down. Since under the Swiss regime participations are not deducted from regulatory capital, but are risk-weighted and backed by equity (see section 7.2.3.1), these write-downs had a significant negative impact on the parent bank's capital resources.

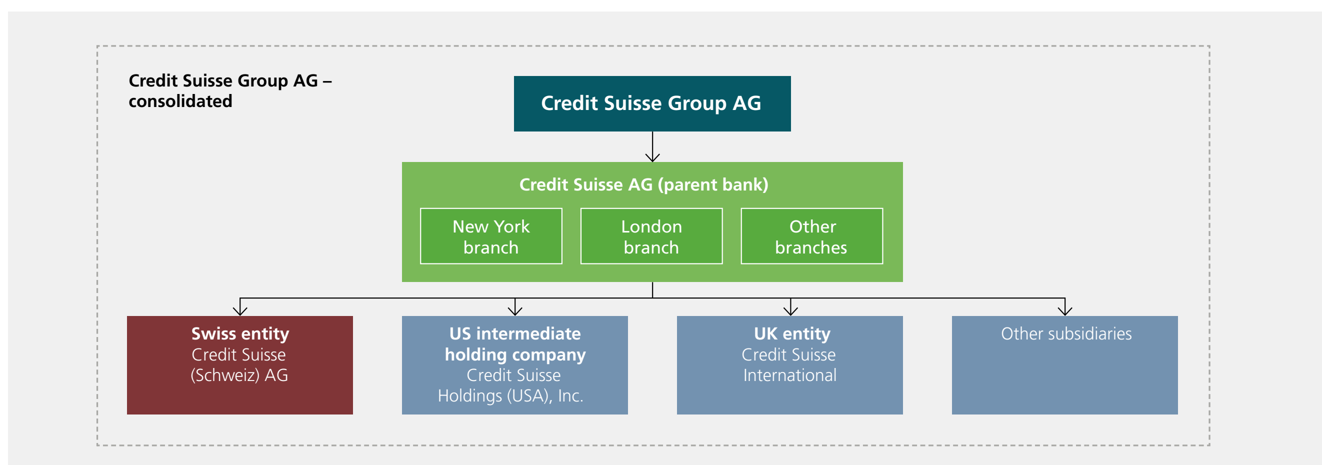

Figure 7: Simplified structure of Credit Suisse Group before the takeover (source: SNB, Financial Stability Report 2023)

[288] Expertenkommission zur Limitierung von volkswirtschaftlichen Risiken durch Grossunternehmen, Schlussbericht, 30 September 2010

[289] "Double leverage" refers to the use of debt to finance equity within a group. This occurs, for example, when a holding company raises debt on the market and uses it to finance the equity of a subsidiary (see also section 14.4.1)

The crisis has also shown that the parent banks are indirectly systemically important due to their size and the centralised functions they perform for the group (in particular liquidity management) and for reputational reasons (a failure in the cross-border wealth management business would damage the reputation of the Swiss financial centre). This is despite the fact that the systemically important functions are located in the Swiss subsidiaries.

The large group companies of the Swiss G-SIBs are also de facto systemically important in the USA and UK from the perspective of the foreign supervisory authorities. It is therefore likely that these authorities would take ring-fencing measures if the group were facing imminent bankruptcy.

In general, experience has shown that, in times of crisis, the focus shifts from the group as a whole to individual institutions. This also brings the capitalisation of the parent banks to the fore.

14.1.3 Operational and financial interdependencies

The Swiss G-SIBs (now only UBS) consist of a large number of operational legal entities that perform different functions in the provision of wide-ranging global banking services. Numerous factors influence this complex transnational corporate structure. These are mainly regulatory, commercial, tax and political requirements in the countries in which banking services are provided or where a physical presence is required. Customer requirements and the local availability of qualified personnel and refinancing options also play an important role. G-SIBs optimise their business model based on these parameters and exploit arbitrage opportunities between the various requirements. For example, high-risk business activities are preferably booked in jurisdictions with lower regulatory requirements. As a result, extensive financial and operational interdependencies arise between the various legal entities of a group.

Operational interdependencies arise through the provision of services across institutions (e.g. IT, human resources, risk management, finance). The group's central functions are brought together in separate legal entities known as "business service companies" (ServCos), which operate as intragroup service providers. The ServCos are generally located at group level, but certain jurisdictions require selected banking services to be provided locally in the respective country. Operational disentanglement or the pooling of service provision in specialised legal entities ensures that, if one operational bank entity fails, the provision of services to other bank entities within the group will, in principle, be safeguarded. However, it must be assumed that the loss of substantial business volume, due for example to the bankruptcy of a service recipient, will affect the ServCos both financially and reputationally.

Financial interdependencies result from centralised borrowing and the intragroup management of liquidity and funding by the central treasury, which is located in the parent bank. These interdependencies are essentially star-shaped, i.e. the liquidity needs or surpluses of individual legal entities are balanced with the parent bank. This creates a primarily vertical interconnectedness with the parent bank. In this context, the individual legal entities must comply with local liquidity requirements, particularly with regard to minimum liquidity and maturity structure. These differ significantly depending on the country and business activity. It is then the task of the central treasury to coordinate payment flows, maturity profiles and currencies and to place or refinance surpluses and deficits centrally on the market. This is crucial because the different legal entities often have different balance sheet structures and therefore different funding profiles. Companies active in wealth management tend to have more customer deposits than loans and therefore a structural liability surplus. In the context of regulatory liquidity requirements, this balance sheet structure leads to a short-term refinancing deficit in the LCR (due to high assumed customer outflows) and a long-term liquidity surplus in the NSFR (inclusion of stable customer deposits). In a global banking model, this surplus can be made available via the central treasury to entities with large lending volumes (e.g. the investment bank) in order to finance their lending business. Meanwhile, short-term refinancing needs can be covered cost-effectively through the interbank money market.

This centralised refinancing model has major advantages: it coordinates the management of cash flows, reduces counterparty risk on the market and is cost-efficient. However, the approach results in substantial financial interdependencies with the parent bank, which could lead to significant contagion effects.

The financial interdependencies are therefore a consequence of the structure of the banking group, which in turn results from the regulatory requirements of the jurisdictions in which the banking group operates. In the regulation of financial interdependencies, a certain fungibility of financial resources is generally assumed, i.e. it is assumed that the funds (equity and liquidity) can basically flow freely to where they are needed most.

In the (heterogeneously) regulated international environment, the limits of this free deployability and rapid transferability of funds become apparent. Moreover, the bank's local decision-makers in the respective jurisdictions are often reluctant to hand over their own resources to the group. The regulation of intragroup interdependencies must take this into account: while the advantages of centralised treasury should be acknowledged, the realities around the availability and recoverability of funds, not only in normal business operations but also in stress situations in particular, must be reflected in the requirements. While legal entities that are completely financially autonomous may minimise financial contagion effects, they undermine the centralised treasury model and also make it more difficult for G-SIBs to provide cross-border services.

14.1.4 Dual holding structure

UBS currently has a dual holding structure, with a parent bank (AG) underneath the holding company (Group AG). This parent bank operates simultaneously as the parent company of the various operating legal entities and as an operating bank. With the treasury, it performs centralised functions for the financing of the group. The parent bank issues certain bonds and has its own deposits. The confidence of investors and depositors in the financial strength of this entity is crucial, since in the event of bankruptcy, it is this entity and not the group against which they have a claim. As noted above, the dual holding structure and the pooling of central functions in the parent bank allows UBS to achieve synergy gains. Services provided to the group are bundled in ServCos, which are directly attached to the holding company. Separate service companies have only been established for the US entities. A complete transfer of central functions and services to the individual subsidiaries would lead to a fragmentation of the group.

The simplified legal structure of Credit Suisse prior to the takeover by UBS (see Figure 7) can also serve as an illustration of the dual holding structure.

The dual holding structure entails additional organisational complexity and is somewhat of an exception in international terms. While the large US banks with their intermediate holding companies also have a multiple-holding structure, the domestic authorities impose strict rules regarding the structure and financial interconnectedness of their entities. In the UK, the operating entities of G-SIBs are positioned directly beneath the holding company. Deutsche Bank has an operating bank at the top, which also holds the subsidiaries.

As an illustration of a counter-example to the dual holding structure, the structure of British banking group HSBC is shown below (Figure 8). This is organised in such a way that all local subsidiaries are directly attached to the holding company. There is also a local intermediate holding company for each local subsidiary.

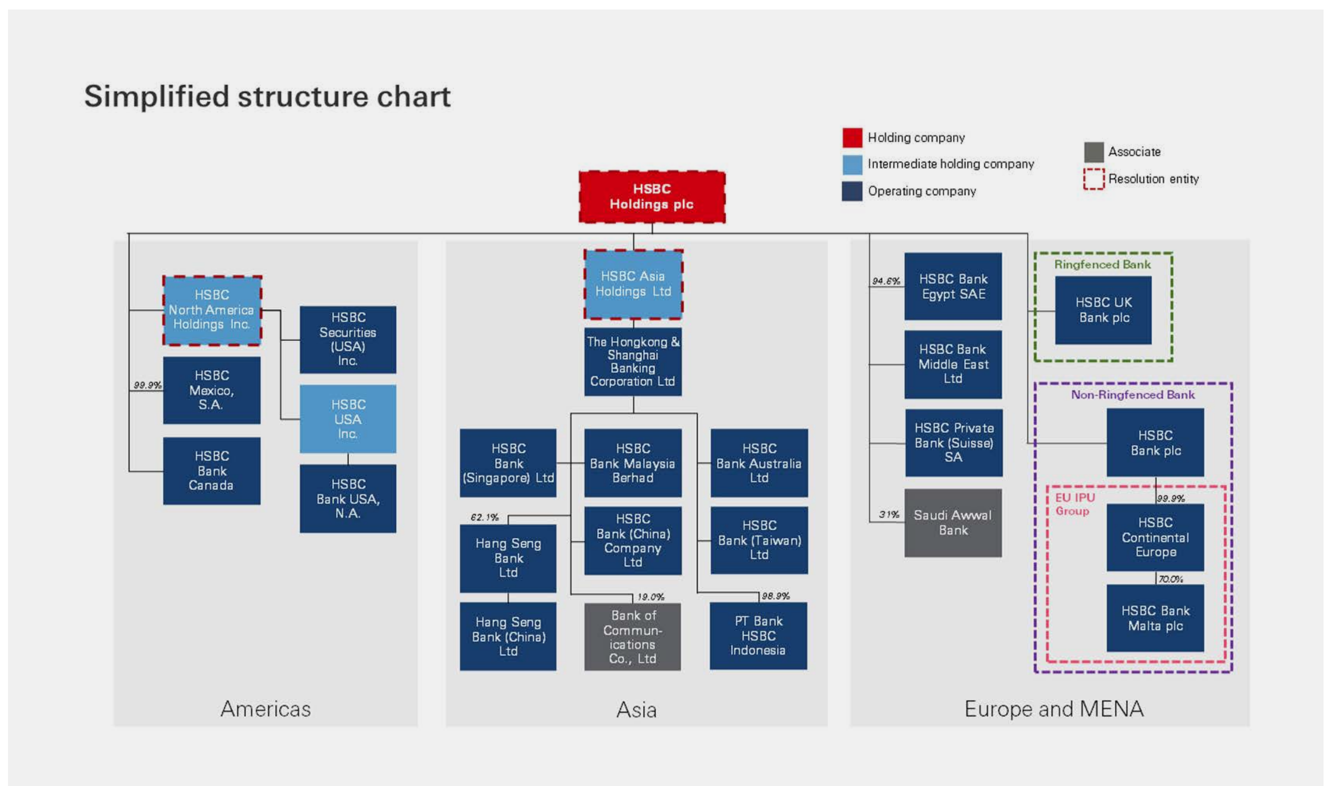

Figure 8: Simplified structure of HSBC Group (source: HSBC)

14.2 International comparison

The various regulations in other jurisdictions are essentially structural measures to reduce complexity or to facilitate the resolution of banks.

14.2.1 United States

In the USA, Section 619 of the Dodd-Frank Act, known as the Volcker Rule, prohibits commercial banks from engaging in proprietary trading. These banks are also not permitted to acquire participations in hedge funds and private equity firms.[290] This rule was watered down in 2020.[291]

Smaller regional banks were exempted from the most stringent regulations, with the total asset threshold raised from USD 50 billion to USD 250 billion (meaning, among other things, reduced liquidity requirements, fewer stress tests and waiving of comprehensive resolution plans).[292] In addition, banks are allowed to invest in venture capital funds again. Following the turmoil in the US banking sector in March 2023,[293] there have been efforts to tighten up again some of the watered-down Dodd-Frank regulations for large regional banks with total assets of between USD 100 billion and USD 250 billion.

290 Viñals et al., Creating a Safer Financial System: Will Volcker, Vickers, and Liikanen Structural Measures Help?, IMF Staff Discussion Note 13/4, May 2013

291 Smith, How the Dodd-Frank Act Protects Your Money, article in Forbes Advisor, 10 March 2023

292 Rodriguez Valladares, How Trump's Deregulation Sowed The Seeds for Silicon Valley Bank's demise, article in Forbes, 12 March 2023

293 The White House, FACT SHEET: President Biden Urges Regulators to Reverse Trump Administration Weakening of Common-Sense Safeguards and Supervision for Large Regional Banks, 30 March 2023

14.2.2 United Kingdom

In the UK, the largest banks have had to separate core retail banking activities from other activities (e.g. investment and international banking) since 2019.[294] This can be done within the banking group. This corresponds to the Swiss model in which the subsidiaries house systemically important functions. In December 2022, with the aim of stimulating economic growth, it was announced that the regulations would be relaxed, including the requirement for ring-fencing.[295] A consultation on this ran until the end of November 2023.[296]

14.2.3 European Union

In the EU, the reforms proposed in the 2012 Liikanen Report were not implemented, in particular separating proprietary trading and other high-risk activities from deposit-taking and lending.[297] In acknowledgement of the benefits of the universal banking model, the separation could have been done within a banking group by means of legal and operational safeguards (ring-fencing). The separation of other activities (e.g. market making) would have depended on the credibility of the recovery and resolution planning. The proposal was withdrawn in 2018, with reference to the fact that many of the original objectives had been achieved through other regulatory projects (including progress on resolution).

14.3 Assessment

Structural measures aim to facilitate resolution by giving the bank an appropriate organisational structure. This chapter has highlighted organisational aspects (especially the parent bank structure) that increase the complexity, and hence the risks, of a successful bank resolution. At the same time, however, it has been shown that it is not primarily the structure per se that is a problem, but rather the underlying financial and operational interdependencies.

If resolvability is to be enhanced in this context, the complexity – arising particularly from operational and financial interdependencies – must be reduced and the risks – associated with capital losses and liquidity outflows – must be absorbed. Suitable measures in this regard include, for example, deducting participations from the capital requirements (see section 7.5.1) and making a resolution plan for the parent banks a legal requirement (see section 13.4.2)). With these approaches, resolvability could be further improved even without far-reaching structural measures. If an improvement cannot be achieved in this way, structural measures represent another possible instrument.

Structural measures could also be applied on a subsidiary basis, meaning that FINMA could only order them if a parent bank resolution plan to be drawn up by the bank failed to meet the requirements. This would be in line with the emergency planning process. An example of such a structural measure would be the requirement that the investment bank be separated from the rest of the group. It would be primarily the bank's responsibility to organise itself in such a way as to ensure its resolvability (e.g. by reducing operational and financial interdependencies and adjusting its capital and liquidity resources). FINMA could order structural measures only if the bank failed to demonstrate that it was appropriately organised. This is in line with the principle of subsidiarity and is based on the idea that functional requirements are much less burdensome for the parties concerned than substantive requirements.

14.4 Possible measures

Discussed below are individual structural measures that would reduce the complexity of banks, and in some cases also the risks, and facilitate the implementation of resolution. The advantages and disadvantages of each are also examined. The order of the measures discussed corresponds to the magnitude of the intervention in the bank's structure.

The measures in this thematic area are also assessed as a whole due to their interdependencies. The final section of this chapter presents conclusions and proposes a specific mix of measures.

14.4.1 Flat organisational structure

A flat organisational structure means that there is no parent bank between the holding company and the subsidiaries. Consequently, all subsidiaries (and any service companies) would be directly attached to the top-level entity

[294] Bank of England, Ring-fencing, web page

[295] HM Treasury, Edinburgh Reforms hail next chapter for UK Financial Services, 9 December 2022

[296] HM Treasury, A smarter ring-fencing regime: Consultation on near-term reforms, 28 September 2023

[297] Westman, The Liikanen Report and the proposal for a resolution framework – 10 years on, Single Resolution Board, 3 October 2022

(group or holding company). Implementing this set-up would mean that the participations previously held by the parent bank in the subsidiaries would have to be transferred to the holding company.

Branches would be attached to the individual subsidiaries. A flat organisational structure does not in itself preclude the top-level entity from operating as a bank in addition to its function as a holding company. Such a banking operation would require further specifications regarding the group's balance sheet (clean holding company, see section 14.4.2).

Double leverage is also possible with a simple holding structure without parent banks if the holding company raises debt capital and uses it as equity to invest in subsidiaries. To prevent double leverage, a flat organisational structure (flat holding) would have to be combined with a clean holding company requirement. If the holding company can only hold loss-absorbing funds as liabilities, no debt financing of participations is possible. Double leverage could also be prevented if participations in subsidiaries had to be deducted from the holding company's equity.

From a resolution perspective, it would be ideal if each subsidiary had its own independent liquidity management and financed itself via the market. For this, intragroup interdependencies would have to be significantly curtailed or only allowed if secured (in the case of liquidity) or with a high risk weight (in the case of participations). This would have to be ensured by a corresponding regulatory requirement, since with a flat organisational structure, centralised liquidity management could in principle also be located at the holding company level. Central services such as IT, legal or human resources could either be provided in the individual subsidiaries or outsourced to a service company attached to the holding company. UBS already has such a company (UBS Business Solutions AG), which provides services for the entire group. In addition, due to local requirements, the US holding company has its own service company (UBS Business Solutions US LLC) attached to this holding company (see Figure 9).

Switching to a flat holding structure would significantly reduce organisational complexity and create more transparency regarding capital and liquidity resources. However, the restructuring would entail substantial costs for the bank and the possible abandonment of a central treasury could make liquidity management within the group more difficult. For example, significantly higher funding costs could ensue because the individual subsidiaries would have to finance themselves individually and set up their own investor relations team.

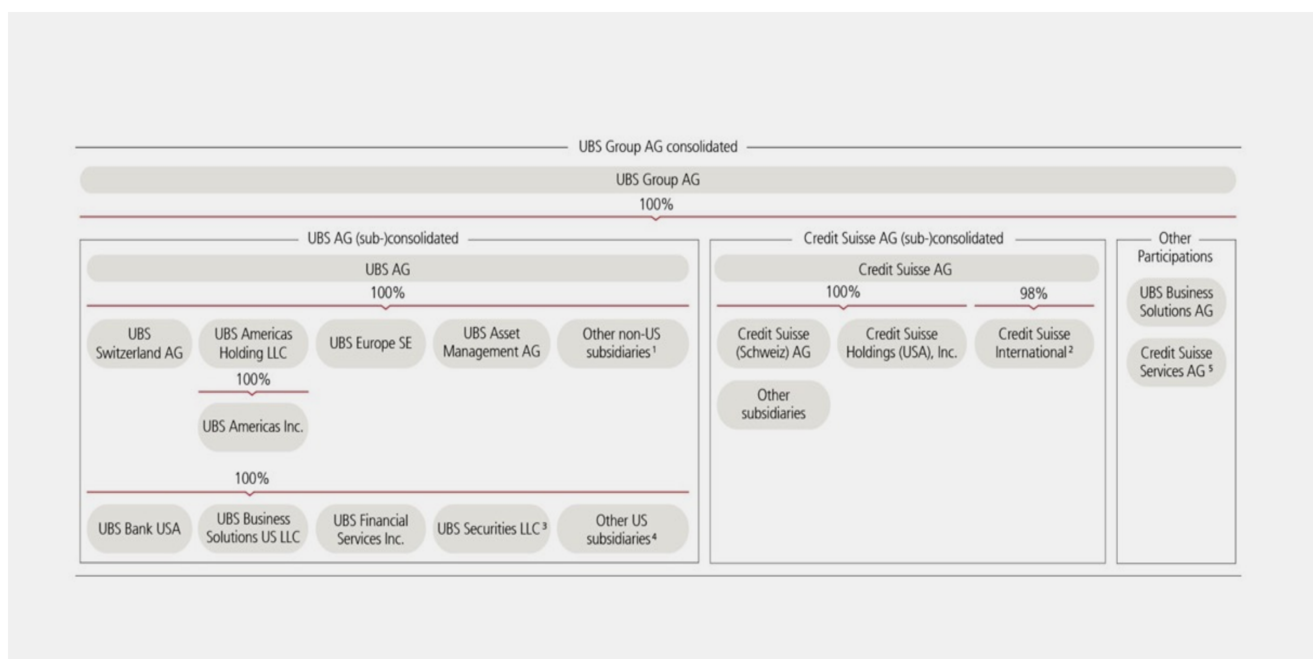

Figure 9: Simplified structure of UBS after the takeover of Credit Suisse (source: UBS)

14.4.2 Clean holding company

The purpose of a clean holding company is to simplify the balance sheet of the top-level entity in a banking group in order to limit the group's financial interconnectedness with a view to improving its resolvability. Switzerland currently has no regulations concerning clean holding companies. In addition to loss-absorbing funds (TLAC), bank holding companies can hold an unlimited amount of liabilities classified as "other claims". At the end of June 2019, both Swiss G-SIBs held other liabilities in addition to TLAC.[298]

The introduction of a clean holding company requirement would entail specifications on what types of liabilities banks could hold on the group's balance sheet. According to these specifications, a clean holding company is one that holds no or only a few liabilities not qualifying as TLAC ("other claims"). In this connection, the FSB TLAC Term Sheet[299] distinguishes between liabilities that form part of TLAC ("eligible liabilities") and those that are excluded from it ("excluded liabilities").

In the case of a clean holding company, the top-level entity holds equity, AT1 instruments and bail-in bonds on the liabilities side and the participations in subsidiaries on the assets side, in the separate financial statements. The group should not enter into any financial agreements that would constitute an obstacle to resolution. In the USA, the clean holding company requirement is intended to prevent the holding companies of the US G-SIBs from entering into financial obligations that would constitute an obstacle to resolution. Accordingly, these G-SIBs should not enter into short-term debt (including deposits) with external investors and derivatives or other types of financial contracts with external counterparties.[300] There is also a clean holding company requirement in the UK.[301]

Current Swiss law has a requirement relating to the structure of the bank's liabilities (Art. 30b para. 8 BankA). It stipulates that – in deviation from the creditor hierarchy otherwise provided for – bail-in bonds rank pari passu with "other claims", provided that the "other claims" that rank pari passu do not exceed 5% of the nominal value of the total eligible bail-in bonds (see section 13.1.4.6). In order to achieve a clean holding company, it could then be enshrined in law that "other claims" may not account for more than 5% of the nominal value of the bank's total liabilities. This would also ensure the subordination of bail-in bonds, i.e. guarantee that these instruments absorb losses before the "other claims".

UBS Group AG would already meet such a clean holding company requirement today. There are no other financial interdependencies with third parties. Hedging is carried out via UBS AG. The other liability items are insignificant.

As an alternative to an explicit requirement, a clean holding company structure could also be ensured as part of resolution measures. In particular, the proposed resolution plan for the parent bank (see section 13.4.2) would be a suitable means of reducing intragroup interdependencies and thus also ensuring a clean holding company structure.

14.4.3 Segregated banking system

Following the takeover of Credit Suisse by UBS, motions were submitted in the Swiss Parliament calling for a segregated banking system (motion 23.3478 "A segregated banking system for systemically important banks" from the Green Group, motion 23.3449 "No more too-big-to-fail Swiss banks" from Councillor of States Marco Chiesa). The aim of the segregated banking system is to protect systemically important functions (e.g. the deposit and lending business) by separating them from risky business areas (mostly trading activities and the securities business).[302] Depending on the proposal, segregation could take place within a group through legal and operational arrangements, or the activity would need to be outsourced from the group.

As part of their emergency planning, the Swiss G-SIBs formed Swiss subsidiaries to which they outsourced the systemically important functions. This means that a segregated banking system has already been implemented in

[298] At Credit Suisse, this related primarily to a loan from Credit Suisse AG to Credit Suisse Group AG, mainly used to finance dividend payments (approximate volume: CHF 3 billion). At UBS, other liabilities related to provisions for the payment of deferred remuneration to employees (approximate volume: CHF 2 billion) and loans from UBS AG to UBS Group AG for the financing of UBS Business Solutions AG (approximate volume: CHF 900 million)

[299] FSB, Principles on Loss-absorbing and Recapitalisation, Capacity of G-SIBs in Resolution, Total Loss-absorbing Capacity (TLAC) Term Sheet, 9 November 2015

[300] Press release of the Board of Governors of the Federal Reserve System, Federal Reserve Board adopts final rule to strengthen the ability of government authorities to resolve in orderly way largest domestic and foreign banks operating in the United States, 15 December 2016

[301] Bank of England, The Bank of England's approach to setting a minimum requirement for own funds and eligible liabilities (MREL), June 2018

[302] See also Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 32

Switzerland to a certain extent, in the sense of a legal separation of activities within the group. However, the systemically important functions (in the Swiss subsidiary) and investment banking (in the parent bank and foreign subsidiaries) are still managed under the same umbrella (i.e. within the same group). A truly segregated banking system would go further and require the complete separation of the Swiss subsidiaries (containing the systemically important functions) and the investment banking business from the group. Moreover, the business scope of Credit Suisse (Schweiz) AG went well beyond the systemically important functions. The same is true of UBS Switzerland AG.[303] This could jeopardise implementation of the emergency plan, as it makes a possible sale of these group entities more difficult in the event of resolution.

A thorough segregated banking system with the separation of systemically important functions from the group represents a far-reaching intervention in the bank's current business model. It is true that a segregated banking system could better protect systemically important functions from losses in other areas and possibly also make resolution easier because interdependencies would be reduced compared with the current situation. However, operating in multiple business lines helps to enhance diversification and thus lower risks.

Moreover, implementing such a system would pose significant demarcation issues, in particular whether innovations in individual business lines should remain part of the core business or be separated. Also, losses do not necessarily always stem from investment banking. The international wealth management and asset management business can also generate substantial losses, legal risks, and so on.

Accordingly, the Expert Commission from 2010[304] also concluded that that far-reaching structural measures such as direct size restrictions, the break-up of G-SIBs and the segregated banking system were disproportionate and should be rejected. Similarly, the expert opinion by Ammann et al. states that a segregated banking system cannot be the first choice for resolving the TBTF issue.[305] The Expert Group on Banking Stability also reached the same conclusion.[306]

A more proportionate solution could be to require that the Swiss subsidiary be strictly limited to systemically important functions. There could also be a requirement – as in the case of the US subsidiary – that the Swiss subsidiary have its own service company (Art. 61 para. 1 let. d BankO). This would ensure that, in the event of a crisis, access to the services and resources required to continue the systemically important functions would be guaranteed, independently of the other parts of the bank.

14.4.4 Size restriction

The cause of the TBTF issue can be tackled directly by limiting the size of financial institutions.[307] One could consider direct size restrictions, for instance by imposing a maximum market share or maximum ratio of total assets (or also off-balance-sheet items such as derivatives) to GDP. Were a bank to exceed the relevant thresholds, it would have to split up or take other organisational measures to reduce its size. A size restriction would mean that the bank would be subject to strict limits on both internal growth and external growth through acquisitions. Alternatively, indirect incentives could be provided to reduce size, for example through stronger progression (see section 7.5.3) in the TBTF capital requirements for G-SIBs.

When discussing size restrictions, it is important to consider the extent to which size can bring advantages. Both economies of scale and economies of scope are conceivable in this respect. For example, efficiency gains from economies of scale can be achieved as IT platforms can be scaled up at little additional cost. However, the G-SIBs also have a higher cost structure for investment banking and US wealth management due to their international orientation and the wage levels in the USA. For Swiss G-SIBs, there appears to be no empirical evidence of "scale effects" – the ability to produce larger volumes at lower average costs.[308] In addition to economies of scale, G-SIBs could also realise economies of scope. The banks argue that offering asset management and investment banking (securities trading and underwriting) under one roof has advantages for serving discerning clients.

[303] UBS Switzerland AG comprises the entire personal and corporate banking business as well as the wealth management business booked in Switzerland

[304] Expertenkommission zur Limitierung von volkswirtschaftlichen Risiken durch Grossunternehmen, Schlussbericht, 30 September 2010

[305] Ammann et al., Reformbedarf in der Regulierung von "Too Big to Fail" Banken, 19 May 2023, p. 34

[306] Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023

[307] SNB, Financial Stability Report 2009, August 2009, p. 10

[308] Blatter and Fuster, Scale effects on efficiency and profitability in the Swiss banking sector, Swiss Journal of Economics and Statistics 158, No. 12, 9 May 2022

Size restrictions as a measure could easily resolve the TBTF issue and thus greatly reduce the risks for the federal government and taxpayers, especially given that there is currently no empirical evidence of scale effects. However, this would mean the loss of economies of scope for large customers in particular, insofar as the services concerned could not be provided by smaller banks. The measure would also represent a massive encroachment on economic freedom. Moreover, the decisive factor is not the size of a bank per se but the risk it takes on.

14.4.5 Break-up

Another way to reduce the size of the bank would be to split it up into smaller entities. This would mean requiring the bank to sell individual parts of its business. For example, the investment banking business could be sold to a foreign bank, or parts of the Swiss business to domestic banks. Specifically, UBS could be obliged to sell Credit Suisse Schweiz AG, instead of integrating it. A break-up of the bank would logically have to be combined with a segregated banking system or a limitation of market share. In addition, all significant business relationships would have to be stopped in order to avoid a de facto obligation to assist an important business partner. Otherwise, the bank could undermine the effect of the break-up through internal growth or acquisitions.

A break-up of UBS would mitigate the TBTF issue but not resolve it, unless the required break-up was very far-reaching. A spin-off of the former Credit Suisse Schweiz AG would merely restore the situation prior to the takeover of Credit Suisse by UBS. UBS would still be a G-SIB. The same applies to a spin-off of investment banking.

14.4.6 Conclusion and proposed mix of structural measures

Structural measures can effectively address the TBTF issue, for example by restricting the size of banks. However, such measures are of limited precision as their application is not confined to the core of the problem. For example, it is not just the size of a bank that is problematic from a TBTF perspective, but also its risk appetite, interconnectedness with other institutions, and so on. Structural restrictions on the business model (e.g. introduction of a segregated banking system, spin-off of business lines) do not directly address the bank's internal financial and operational interdependencies, which could jeopardise its resolvability and thus represent the actual problem.

Another negative aspect of structural measures is the fact that they encroach very significantly on economic freedom in that the state restricts the possible business models. Structural measures are associated with high costs as they curtail the efficient design of business models.

This chapter has shown that the same goals can be achieved with more efficient and proportionate measures. Suitable measures in this regard include, for example, increasing capital requirements for foreign participations (see section 7.5.1) and making a resolution plan for the parent banks a legal requirement (see section 13.4.2). In this way, resolvability can be significantly improved even without far-reaching structural measures.

Failing that, structural measures could be applied on a subsidiary basis, in that FINMA could only order them if, for example, a parent bank resolution plan to be drawn up by the bank failed to meet the requirements. An example of such a structural measure would be the requirement that the investment bank be separated from the rest of the group. It is primarily the bank's responsibility to organise itself in such a way as to ensure its resolvability, for instance by reducing operational and financial interdependencies and adjusting its capital and liquidity resources. This is in line with the principle of subsidiarity and is based on the idea that functional requirements are much less burdensome for the parties concerned than substantive requirements.

Accordingly, the Federal Council is not proposing any direct structural measures for implementation.

15 Corporate governance

15.1 Introduction

The Credit Suisse case and other high-profile incidents have shown that deficiencies in the corporate governance of financial institutions can have serious consequences.[309] Corporate governance matters are therefore a key issue not only for the financial institutions and their owners, but also for the financial market supervisory authorities.

FINMA made corporate governance a priority issue in its 2019 annual report,[310] long before the events surrounding Credit Suisse in 2023. On 18 November 2020, the Federal Council approved FINMA's goals for 2021 to 2024, the third of which concerns the promotion of responsible corporate governance at financial institutions.[311] Since then, FINMA has provided regular updates on its corporate governance supervisory activities in its annual reports.[312]

Ultimate responsibility for the corporate governance of financial institutions lies with the bodies responsible for governance, supervision and control and for operational management.[313] Accordingly, the individuals at the top management levels of a financial institution have a special responsibility for corporate culture and governance. The action or inaction of financial market executives (e.g. in remedying shortcomings in the organisation) can cause major damage to the financial institution itself, to the Swiss financial centre and to the national economy. This applies in particular to systemically important banks.

In the following, the existing legal framework for the corporate governance of banks is assessed and the possible need to adapt the current regulatory rules with a direct bearing on corporate governance is discussed. This is also intended to address the concerns of postulate 21.3893 "Make financial market senior executives more accountable with lean tools" and to show what adjustments to FINMA tools would be necessary to incentivise the top executives of financial institutions to assume greater individual responsibility and accountability and to assign individual responsibilities to the management bodies.

The existing provisions on the responsibility of managers in the current Swiss legal system are set out in an excursus in section 15.2.5.

Given the broad subject matter, the analysis in this chapter is divided into the following three areas,[314] which are particularly relevant against the backdrop of the Credit Suisse crisis, with a view to strengthening the TBTF regime and in view of parliamentary initiatives that have been submitted:

- Corporate governance in general
- Individual accountability
- Remuneration.

The assessment and review of FINMA instruments in the area of corporate governance is particularly relevant for SIBs. However, any measures may in principle also apply to other banks and financial institutions where appropriate on the basis of existing risks or for reasons of equal treatment.

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309 For example, FINMA identified deficiencies in risk management and organisational structures at Credit Suisse in connection with the Greensill and Archegos cases (see FINMA press release, FINMA concludes "Greensill" proceedings against Credit Suisse, 28 February 2023; FINMA press release, Archegos: FINMA concludes proceedings against Credit Suisse, 24 July 2023)

310 FINMA, Annual Report 2019, 2 April 2020

311 FINMA press release: FINMA publishes its goals for 2021 to 2024, 18 November 2020

312 FINMA, Annual Report 2020, 25 March 2021; FINMA, Annual Report 2021, 5 April 2022; FINMA, Annual Report 2022, 27 March 2023

313 The names of the governing bodies of financial institutions are inconsistent in the various financial market acts. For example, the BankA and the IOA distinguish between the bodies responsible for "management" and "governance, supervision and control". In this report, the terms "supreme governing body" and "management body" are used synonymously with the terms "board (of directors)" and "executive board" respectively, although the latter strictly speaking refer only to the governing bodies of companies limited by shares, but are nonetheless in common use

314 Chapter 16 deals with supervisory instruments such as giving FINMA the authority to impose fines and greater public disclosure by FINMA, which could also affect an institution's corporate governance

15.2 Corporate governance requirements in financial market law

15.2.1 Background

15.2.1.1 Objective of corporate governance requirements

The purpose of corporate governance requirements for financial institutions is to ensure that supervised institutions develop, maintain and refine principles and structures that ensure appropriate management and control of their activities by their governing bodies. In contrast to law on companies limited by shares (see section 15.2.5), financial market law generally requires a separation – both functional and in terms of personnel – between strategic control and operational management, irrespective of the legal form, i.e. a two-tier (or dualistic) system.

Accordingly, the board of directors or supreme governing body of financial institutions has, among other things, ultimate organisational responsibility and thus responsibility for the overall design of risk management and internal control, while the management body is in charge of, among other things, operational risk control and the design of the internal control system. Risk management and internal control are central pillars of corporate governance at financial institutions. Their design and the culture in which they are practised at all levels of the hierarchy are crucial for the fulfilment of supervisory requirements (in particular licensing requirements).

15.2.1.2 Current corporate governance standards

Swiss financial market law does not include any general corporate governance standards. However, numerous provisions regulating aspects of corporate governance can be found in various pieces of financial market legislation. The most recent and detailed provisions are those of the Financial Services Act of 15 June 2018[315] (FinSA) and the Financial Institutions Act of 15 June 2018[316] (FinIA) and their implementing provisions. Conversely, the provisions of the BankA and BankO are among the oldest and are positioned differently in terms of regulatory levels. Thus, securities firms, which are subject to the FinIA, are bound by different and more detailed rules than SIBs, which are subject to the BankA.

The FinIA sets out the minimum requirements for the organisation of financial institutions at the legislative level (Art. 9 para. 1 FinIA), obliges financial institutions to manage and control risk (para. 2) and gives the Federal Council the power to set more extensive organisational requirements at the ordinance level. The risk management requirements for banks, on the other hand, are regulated at ordinance level (Art. 12 para. 2 BankO). Meanwhile, the risk management requirements for insurance companies are regulated at the legislative level in Article 22 IOA.

15.2.1.3 Role of supervision in relation to corporate governance

It is primarily up to the institutions themselves to establish corporate governance that is appropriate for their business activities and is in line with the applicable legal requirements. The board of directors, and in particular its chair, play a key role in implementing and enforcing a strategy geared towards entrepreneurial success and appropriate corporate governance of the firm.

In this context, monitoring corporate governance is an important task of the supervisory authority, including in the licensing process. This task includes, for example, assessing whether the board of directors is correctly composed, whether its members have the necessary expertise and whether it can adequately control the executive board, monitor the institution's risk profile and manage the strategy. Other examples include whether the remuneration system provides the right incentives and to what extent risk control and internal audit are independent and have the necessary powers. If the supervisor concludes that there are deficiencies in this area, it must initiate the necessary measures with the supervised party and enforce them.[317]

[315] SR **950.1**

[316] SR **954.1**

[317] BCBS, Report on the 2023 banking turmoil, October 2023, p. 19

15.2.1.4 FINMA circular

The FINMA circular "Corporate governance – banks" (Circ. 2017/1) represents FINMA's codified practice on corporate governance in relation to the BankA.[318] It explains the basic tasks and responsibilities of the board of directors, the executive board, the internal control system and the internal audit. Nothing is specified for individual office holders. The circular – like that relating to the insurance sector (Circ. 2017/2) – is regularly criticised by the industry[319] and occasionally by academia.[320] It is claimed that the circulars transpose provisions of law on companies limited by shares (company law) into supervisory law or even stipulate provisions contrary to company law (e.g. guidelines on corporate culture, composition of the board of directors, mandatory evaluation of or principles governing directorships or number of board members, independence provisions) and that they do not have a sufficient legal basis.

15.2.2 International comparison

At international level, guidelines issued by standard setters such as the FSB and BCBS lay down principles on how to strengthen corporate governance and prevent misconduct by institutions and individuals. Individual regulators have also issued provisions, recommendations and guidelines on corporate governance. These are set out below.

15.2.2.1 Financial Stability Board

In 2018, the FSB published "Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors".[321] As well as the imposing of fines and sanctions, which usually target the financial institution rather than individuals, the FSB advocates preventing misconduct ex ante by strengthening governance requirements.

The **importance of corporate** culture is emphasised in this context. This requires top management to bring about a change in attitude and behaviour. According to the FSB, monitoring the relevant corporate governance factors is the responsibility of the supervisory authority. Furthermore, firms must **strengthen individual responsibility and accountability,** with this also being monitored by the supervisory authority.

In addition, the FSB also wants to prevent individuals who engage in misconduct from subsequently doing so again in another firm or another department of the same firm (the "rolling bad apples" phenomenon). This can be achieved by means of in-depth checks ("fit and proper" assessments) by both the firm and the supervisory authority prior to recruitment and also later during employment. The FSB also identifies the OECD's Principles of Corporate Governance[322] as a key standard for sound financial systems.[323]

15.2.2.2 Basel Committee on Banking Supervision

The BCBS issued guidelines on the corporate governance of banks in 2015.[324] In its view, effective corporate governance is crucial for the smooth functioning of the banking sector and the economy as a whole. Weaknesses in corporate governance – particularly at SIBs – can endanger financial stability. The principles set out in the BCBS document are aimed, first and foremost, at a bank's board of directors, which has ultimate responsibility for corporate governance, risk culture and corporate culture. The BCBS also assigns a central role to the risk management and internal audit functions and emphasises, among other things, the importance of remuneration practices that promote corporate governance and risk management. Furthermore, according to the BCBS, supervisors should monitor banks' corporate governance and take corrective action where necessary.

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318 Art. 3 para. 2 let. a and c, Art. 3b–3f, Art. 4quinquies and Art. 6 BankA

319 FINMA, Bericht der FINMA über die Anhörung vom 1. März 2016 bis 13. April 2016 zu den Entwürfen der Rundschreiben, 22 September 2016, p. 6; FINMA, Bericht der FINMA über die Anhörung vom 31. Mai bis 12. Juli 2016 betreffend diverse Rundschreiben zur Versicherungsaufsicht, 7 December 2016, pp. 22–24; Nagel, Der persönliche und sachliche Geltungsbereich des schweizerischen Geldwäschereigesetzes (GwG), mit rechtsvergleichenden Hinweisen zu internationalen Standards, dem Recht der Europäischen Union und dem deutschen Recht, Diss. Bern 2019, Zurich 2020, section 82

320 Kunz, FINMA-Regulierung(en): Macht des Faktischen versus Rechtsstaatlichkeit, Jusletter of 7 May 2028, pp. 38–39

321 FSB, Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors, 20 April 2018

322 OECD, G20/OECD Principles of Corporate Governance, 11 September 2023

323 FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014

324 BIS, Corporate governance principles for banks, 8 July 2015

15.2.2.3 United Kingdom

In a document applying to the firms it supervises, the Prudential Regulation Authority (PRA) sets out those governance responsibilities of the board to which it attaches particular importance.[325] Among other things, the board is responsible for the "culture" of risk awareness and ethical behaviour throughout the organisation. The PRA here emphasises the "tone from the top" in relation to corporate culture.

Also of note in the UK is the Women in Finance Charter, launched by HM Treasury (the UK finance ministry) in 2016.[326] In this voluntary initiative aimed at financial institutions, signatories pledge to work towards gender balance at all hierarchical levels with the aim of promoting corporate culture. In 2023, the Financial Conduct Authority (FCA) and the PRA also consulted the financial industry on a regulatory proposal to boost diversity and inclusion.[327] The authorities' premise is that the diversity of teams and their inclusion in internal processes have a positive impact on corporate governance.

15.2.2.4 European Union

The European Banking Authority (EBA) has issued binding guidelines on internal governance,[328] which apply in principle to all institutions subject to the EU's Capital Requirements Directive[329]. Following the 2007-08 financial crisis, the EU recognised that clear corporate governance is key to the success of institutions, the ethical conduct of individuals and the proper functioning of the banking system as a whole. In particular, it emphasises the importance of clear responsibilities for management bodies, the oversight thereof and the existence of a risk culture.

15.2.3 Assessment

In Switzerland, corporate governance requirements under financial market law for financial institutions differ from sector to sector depending on the respective legislation. Given the great importance of corporate governance, particularly in the case of SIBs, the Federal Council believes that both the legal basis of FINMA's circulars and their content should be strengthened, taking into account international standards. In this respect, the standards governing corporate governance requirements need to be made more specific, something that would assist FINMA's supervisory activities.

In its report on the lessons learned from the Credit Suisse crisis, FINMA states that it identified shortcomings in general corporate governance at Credit Suisse in the years prior to the crisis. Responsibilities were not clearly defined and management often did not demand accountability. A flawed management culture and a weak "tone from the top" over an extended period led to a poor risk culture, which was also characterised by deficiencies in the area of conflicts of interests and a lack of transparency towards FINMA.

Over the years, the governing bodies of Credit Suisse were unable to sustainably remedy shortcomings in the bank's organisation that were repeatedly identified by FINMA and reported to the bank. It can be assumed that more specific corporate governance requirements, which also constitute the starting points for supervision, would have assisted FINMA in its work and enhanced its impact on the bank in the Credit Suisse case.

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[325] Bank of England, Corporate governance: Board responsibilities, Supervisory Statement 5/16, 31 March 2016

[326] HM Treasury and Baroness Penn, Women in Finance Charter, 22 March 2016

[327] FCA, The FCA and PRA propose measures to boost diversity and inclusion in financial services, 25 September 2023

[328] European Banking Authority press release, EBA publishes its final Guidelines on internal governance, 2 July 2021

[329] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ L 176 of 27 June 2013, p. 338

15.2.4 Possible measure

One possible measure is to enshrine in law and strengthen the standards governing corporate governance requirements.

In this context, FINMA's existing supervisory practice (set out in the two aforementioned circulars) may need to be raised to higher regulatory levels in certain areas.

These changes would create an up-to-date standardisation framework for banking corporate governance requirements, ensuring that these requirements are defined at the appropriate level, taking into account international standards, and clarifying the supervision thereof.

More specific rules could be introduced on the following topics in particular: independence requirements for members of the supreme governing body; responsibilities for establishing a sustainable corporate culture; obligations on the part of the board of directors to provide information (e.g. on the greatest risks within the firm); the responsibility of control functions vis-à-vis the management body and supreme governing body; the transfer of a member of the executive board to the board of directors; the role of the chair of the board of directors; and the existence of sufficient expertise and knowledge about Switzerland on the board of directors.

15.2.5 Excursus: responsibility of management bodies in the current Swiss legal system

15.2.5.1 Introduction

This excursus sets out the provisions on the responsibility of managers in the various areas of Swiss law. The following explanations touch on a number of issues that have been raised in various parliamentary procedural requests.[330] Among other things, these call for a legal overview of how former or current management bodies of Credit Suisse can be held accountable.

The assessment of specific responsibilities in the Credit Suisse case is a matter for the relevant courts and supervisory authorities. However, in the spirit of the overview called for, the basis for any responsibilities is set out below in abstract terms, without examining whether these apply in the specific instance.

15.2.5.2 Law on companies limited by shares

The legal parameters for corporate governance and thus also for the responsibilities of company bodies for governance and management and their responsibilities with regard to the supervision, control and compliance of business management are found in company law, in particular the law on companies limited by shares, and are not aimed at financial institutions in particular, but at corporations in general. Improving corporate governance was one of the main objectives of the reform of law on companies limited by shares that came into force on 1 January 2023.[331]

According to Article 717 paragraph 1 of the Swiss Code of Obligations (CO),[332] the members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith. This statutory duty of loyalty requires the members of the board of directors to align their conduct with the interests of the company. The behaviour of a board member is compared with that which could reasonably be expected from a hypothetical individual acting properly in a comparable situation.

The due diligence depends on the law, level of knowledge and standards applying at the time of the act or omission in question. When assessing breaches of the duty of care, an ex ante assessment must therefore be performed. In the prevailing doctrine, the Swiss Federal Supreme Court recognises that courts must exercise restraint in the retrospective assessment of business decisions that have been reached in a proper decision-making process based on adequate information and free of conflicts of interest (known as the "business judgement rule").[333]

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[330] Postulate 23.3439, postulate 23.3441 (letter f of the text), postulate 23.3442 (letter f of the text)

[331] BBl 2017 399

[332] SR **220**

[333] Federal Supreme Court decision (FSC) 139 III 24 E. 3.2, with notes

The organisational structure of a company limited by shares is clearly defined by assigning certain inalienable core powers to the general meeting and the board of directors. Among other things, the general meeting, as the supreme governing body of the company, has the non-transferable power to determine and amend the articles of association, elect the members of the board of directors and the external auditors, approve the management report and the consolidated accounts, and decide on the allocation of the disposable profit.[334] The board of directors has all powers that are not reserved to the general meeting by law or the articles of association.[335]

It also has a number of non-transferable and inalienable duties, in particular the ultimate responsibility for organisational and financial matters as well as the supervision of management with regard to compliance with the law, the articles of association, regulations and directives.[336] In the case of companies whose shares are listed on a stock exchange, preparing the remuneration report also falls within the board's remit.[337] In principle, the board of directors is responsible for the management of the company; however, without prejudice to the inalienable and non-transferable management duties, it may delegate this management to a separate management body in accordance with organisational regulations.[338]

It should be noted that the Code of Obligations explicitly provides for a general reservation in favour of the Banking Act in its final provisions. In particular, financial market law generally requires a two-tier (dualistic) organisational structure, whereas the CO would permit one-tier (monistic) centralisation within the board of directors alone. Even with a two-tier organisation under financial market law, the general provisions of company law also apply in principle to financial institutions organised as companies limited by shares.

The above corporate governance provisions contained in law on companies limited by shares are supplemented by general principles of action. Ultimately, the duty of care and loyalty of the board of directors and executive board enshrined in Article 717 paragraph 1 CO also includes the duty to implement the "principles of contemporary corporate governance adapted to the specific circumstances".[339]

Inadequate fulfilment of assigned duties can be sanctioned, among other things, with directors' and officers' liability under law on companies limited by shares.[340] If the board of directors or the executive board does not fulfil its duties or does so inadequately and the company or third parties suffer damage as a result, its members are personally liable for the damage suffered in accordance with Article 754 CO, provided the damage is causally related to the breach of duty and is attributable to the fault of the members of the board of directors or the executive board. An example of a possible breach of duty in this context would be a lack of, or inadequate, company organisation resulting in careless governance. Under Article 756 paragraph 1 CO, in addition to the company, the individual shareholders are also entitled to sue for any losses caused to the company. The shareholder's claim is for performance to the company.[341]

Under current law, persons who are neither shareholders nor creditors are not entitled to bring an action for liability under company law against members of governing bodies. In the case of Credit Suisse, this means, for example, that the Swiss Confederation cannot bring liability actions against members of the board of directors or the executive board of Credit Suisse. Even in cases where an action can be brought, it is conceivable that there are economic reasons against bringing such actions and taking long-term litigation risks. Experience shows that the probability of success of such actions outside bankruptcy is likely to be less than 50% in most cases, and liability proceedings can drag on for years and over several instances. Even professional and institutional investors are only likely to bring such actions in exceptional cases in the context of the framework conditions.

[334] Art. 698 CO

[335] Art. 716 para. 1 CO

[336] Art. 716a para. 1 CO

[337] Art. 716a para. 1 No 8 CO

[338] Art. 716 para. 2 CO; Art. 716b CO

[339] Bühler, Corporate Governance und ihre Regulierung in der Schweiz, ZGR 41/2012, p. 231

[340] Defects in company organisation can also have further consequences under private law, see Art. 731b para. 1bis CO

[341] Similar action can be brought in the event of bankruptcy in accordance with Art. 757 para. 2 CO, including by company creditors under certain circumstances

In principle, a liability action is excluded if the company has granted discharge by resolution of the general meeting. However, under Article 758 paragraph 1 CO, this resolution of release adopted by the general meeting is effective only for disclosed facts and only as against the company and the shareholders who approved the resolution or who have since acquired their shares in full knowledge of the resolution. Under Article 758 paragraph 2 CO, the right of action of the remaining shareholders lapses twelve months after the resolution of release.

15.2.5.3 Criminal law

Organisational deficiencies on the part of companies can also have consequences under criminal law. For example, board members are held criminally liable if they themselves commit an offence ("perpetrator principle").[342] In addition, a natural person as a corporate body may also be liable to prosecution for offences committed in the company's business line, at least if the natural person in question appears to be the "person ultimately in charge" and is aware of the offences committed in their company but does nothing to prevent them (employer's liability; see Art. 11 of the Swiss Criminal Code[343] [SCC] and Art. 6 para. 2 of the Federal Act of 22 March 1974[344] on Administrative Criminal Law, ACLA).[345] In some cases, an omission offence on the part of the employer exists, in parallel with the conduct offence committed by the subordinate, agent or representative.[346] The passive superior is liable to prosecution under the same criminal provisions as the person subject to the superior's instructions.[347] In this context, the term "employer" includes in particular the directors of a company limited by shares, but also the executive board appointed by the board of directors and de facto governing bodies.[348]

On the basis of Article 29 SCC concerning the liability of governing bodies and representatives, which is applicable to all special offences under the SCC and, in accordance with Article 333 paragraph 1 SCC, also to all federal secondary criminal law, governing bodies, members of governing bodies, shareholders, employees with independent decision-making authority in their field of activity within a company and "de facto managers" who commit an offence cannot evade their criminal liability by arguing that a required characteristic of a perpetrator only exists in the company. This is particularly relevant in the case of bankruptcy and debt collection offences that are linked to the perpetrator's status as debtor (see, for example, Art. 163 para. 1 SCC, Art. 164 para. 1 SCC and Art. 165 para. 1 SCC).[349]

The natural persons mentioned – in particular members of the board of directors – can in principle commit all offences under the SCC and secondary criminal law (in particular federal administrative criminal law).[350] In connection with deficiencies in corporate governance, property offences (see Art. 137 ff. SCC), for example the offences of misappropriation (Art. 138 SCC) and criminal mismanagement (Art. 158 SCC), may be particularly relevant here. However, fraud (Art. 146 SCC) is also conceivable, for example if a person has obtained the position of board member – without having the necessary expertise – by means of fraudulent misrepresentation in order to secure an unlawful gain in this position.[351] Deficiencies in corporate governance can also take the form of bankruptcy and debt collection offences (see Art. 163 ff. SCC) such as reduction of assets to the prejudice of creditors (Art. 164 SCC) or mismanagement (Art. 165 SCC).

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[342] In the area of administrative criminal law, the perpetrator principle is laid down in Art. 6 para. 1 ACLA. However, this provision merely states what applies anyway under general criminal law principles (see Eicker, § 12 Wirtschaftsstrafrecht im Lichte allgemeinen Verwaltungsstrafrechts, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 291 ff., p. 296 footnote 32)

[343] SR **311.0**

[344] SR **313.0**

[345] FSC 96 IV 155 E. II.4b, 176; Niggli and Maeder, § 8 Unternehmensstrafrecht, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 195 ff., p. 201 N 11 and 13

[346] Hauri, Verwaltungsstrafrecht, Bern 1998, Art. 6 N 7

[347] Eicker et al., Verwaltungsstrafrecht und Verwaltungsstrafverfahrensrecht, Bern 2012, p. 51 f.; on the whole topic, see Federal Criminal Court judgment SK.2016.3 of 12 October 2017 E. 5.1.1.2

[348] Ackermann, § 4 Tatbestandsmässigkeit, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 107 ff., p. 145 N 93

[349] Ackermann, op. cit., p. 107 ff., p. 123 N 41

[350] See also Meier-Gubser, Der Treuhänder als Verwaltungsrat, TREX 4/17, section 5.2

[351] Vest, § 13 Allgemeine Vermögensdelikte, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 313 ff., p. 408 N 378

Significantly, the Federal Supreme Court also affirms that gross negligence in the exercise of a profession, under the offence of mismanagement, also exists if statutory corporate governance provisions are disregarded, in particular neglecting to keep accounts or violating the duty of the board of directors of a company limited by shares to notify the court in the event of over-indebtedness.[352] It goes without saying, moreover, that deficiencies in corporate governance can pave the way for offences under criminal accounting law (e.g. failure to keep proper accounts under Art. 166 SCC and failure to comply with accounting regulations under Art. 325 SCC) and for other offences (in particular under common criminal law).

Article 154 paragraph 1 SCC (in force since 1 January 2023) states that members of the board of directors or the executive board of companies whose shares are listed on a stock exchange may be liable to a custodial sentence of up to three years and a monetary penalty if they have paid or accepted remuneration that is not permitted under Article 735c numbers 1, 5 and 6 CO.

Next, financial market criminal law includes various elements of (administrative) offences which (among other things) ensure that FINMA, as part of its ongoing supervisory work, can monitor compliance with the requirements of appropriate corporate governance and of the governing bodies' guarantee of proper business conduct. The elements of offences in the FINMASA, which forms a framework and umbrella law for the other financial market acts, are central here: [353]

– Under Article 45 paragraph 1 FINMASA, anyone who wilfully provides FINMA with false information is liable to a custodial sentence of up to three years or to a monetary penalty (the same applies to the wilful provision of false information to an audit company, a self-regulatory organisation or an agent). Where the offender acts through negligence, he or she is liable to a fine of up to CHF 250,000 (Art. 45 para. 2 FINMASA). The criminal law provision in Article 45 FINMASA aims primarily to safeguard the smooth performance of supervisory activity, in connection with which the principle of completeness applies and the authority, among others, must be provided with all information and documents that it requires to fulfil its duties.[354] Article 45 FINMASA is often applied in practice if governing bodies and guarantors (or potential guarantors) of supervised institutions provide false information and thus, for example, at least abstractly, endanger the orderly performance of the fit and proper assessment.[355]

– The elements of criminal offences under Article 47 FINMASA (Audit of annual financial statements)[356] and Article 48 FINMASA (Non-compliance with rulings) may become at least indirectly relevant.

In addition to the aforementioned criminal law provisions of the FINMASA, other elements of administrative offences also help to ensure that FINMA receives the information required for the ongoing monitoring of compliance with the requirements of appropriate corporate governance and of the governing bodies' guarantee of proper business conduct. These include the following:

– Article 49 paragraph 1 letter b BankA provides for a fine of up to CHF 500,000 for wilful failure to submit mandatory notifications to FINMA; failure to do so out of negligence is punishable by a fine of up to CHF 150,000 (Art. 49 para. 2 BankA). The purpose of the corresponding criminal law provision is, among other things, to enforce the mandatory notifications under Article 3 paragraphs 5 and 6 BankA. These notifications are intended to provide FINMA with the basis for examining whether it is guaranteed that the influence of a natural person or legal entity holding a qualified participation in a bank will not have a detrimental impact on the bank's prudent and sound business activity.[357]

[352] See Federal Supreme Court judgment 6B_1047/2015 of 28 April 2016 E. 4.3

[353] See Maeder, § 18 Rechnungslegungsstrafrecht, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 609 ff., p. 649 N 188

[354] See Federal Criminal Court judgment SK.2017.22 of 14 June 2018 E. 4.2 f.

[355] On the classification as an abstract endangerment offence, see Schwob und Wohlers, Basler Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz, 3rd edition, Basel 2019, Art. 45 FINMASA N 2

[356] Under Art. 47 para. 1 let. a FINMASA, anyone who wilfully fails to have the annual financial statements required by the financial market acts audited by a licensed audit company or to have an audit carried out that has been ordered by FINMA or a supervisory organisation is liable to a custodial sentence of up to three years or to a monetary penalty. Anyone who fails to fulfil his or her obligations vis-à-vis the audit company or the agent is liable to the same sentence/penalty (Art. 47 para. 1 let. b FINMASA). Failure to do so out of negligence is punishable by a fine of up to CHF 250,000

[357] See Art. 3 para. 2 let. cbis BankA and Kleiner and Schwob, in: Bodmer et al. (ed.), Kommentar zum Bundesgesetz über die Banken und Sparkassen, Zurich 2015, Art. 3 BankA N 267

- Anyone who wilfully fails to provide FINMA with the prescribed notifications in accordance with Articles 11 and 15 FinIA – i.e. in particular the notifications of qualified participations in a financial institution that are key to the fit and proper assessment (see Art. 11 para. 5 and 6 FinIA) – or does so incorrectly or too late is liable to a fine of up to CHF 500,000 (Art. 70 let. b FinIA).

While it is true that, in criminal law, the principle applies that a legal entity cannot commit an offence (*"societas delinquere non potest"*), various provisions allow for an exception to this principle:

- Article 102 paragraph 1 SCC, for example, establishes a subsidiary criminal liability of the company in the area of common criminal law. Undertakings can be fined up to CHF 5 million if a felony or misdemeanour is committed in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking.[358] For certain offences,[359] Article 102 paragraph 2 SCC then provides for concurrent criminal liability, i.e. the undertaking is penalised irrespective of the criminal liability of any natural persons, provided it has failed to take all the reasonable organisational measures that are required "in order to prevent such an offence". Whether Article 102 SCC constitutes a separate criminal offence, a mere attribution rule or a new form of guilt or special form of participation is disputed in legal doctrine.[360] The legal precedent of the Federal Supreme Court on this point is not entirely clear.[361]

- In the area of federal administrative criminal law, Article 7 ACLA establishes the criminal liability of undertakings (without prosecution of the acting natural person), which is linked to the condition that the ascertainment of the natural persons liable to prosecution under Article 6 ACLA would require investigative measures that are disproportionate in comparison with the penalty incurred. Where appropriate, the undertaking may be issued with a vicarious fine of up to CHF 5,000 under this provision.

- In the scope of the FINMASA and the other financial market acts within the meaning of Article 1 paragraph 1 FINMASA, Article 49 FINMASA takes precedence over the aforementioned provision of Article 7 ACLA.[362] Under Article 49 FINMASA, the ascertainment of the persons who are criminally liable may be dispensed with and instead the business operation may be ordered to pay the fine if the ascertainment of the persons who are criminally liable under Article 6 ACLA requires investigative measures that are disproportionate in comparison with the penalty incurred, and a fine of up to CHF 50,000 may be considered for violations of the criminal provisions of the FINMASA or the financial market acts.

15.2.5.4 Public law

The financial market regulations on corporate governance focus on the supervision of institutions. However, various instruments available to FINMA also enable it to take measures against employees. Management bodies of the institutions can also be held accountable under public law in this context. The instruments of this individual liability are discussed in detail in section 15.4 below.

15.2.5.5 Self-regulation

Self-regulation traditionally plays a key role in corporate governance matters. In this context, a distinction is made between state-controlled and voluntary self-regulation.

State-controlled self-regulation

Corporate governance requirements in relation to state-controlled self-regulation arise primarily out of listing on a stock exchange. The Financial Market Infrastructure Act of 19 June 2015[363] (FinMIA) requires stock exchanges to regulate the admission of securities to trading, taking into account international standards.[364]

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358 Fischer, Organisation und Haftung im Aktienrecht, AJP 2020, p. 284 ff.

359 Art. 260ter SCC (Criminal organisation), Art. 260quinquies SCC (Financing terrorism), Art. 305bis SCC (Money laundering), Art. 322ter SCC (Bribery of Swiss public officials), Art. 322quinquies SCC (Granting an advantage), Art. 322septies para. 1 SCC (Bribery of foreign public officials) and Art. 322octies SCC (Bribery of private individuals)

360 For a detailed discussion, see Cassani, Droit pénal économique, Basel 2020, p. 116 ff.; Niggli and Maeder, § 8 Unternehmensstrafrecht, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 203 ff. N. 19 ff.

361 See Niggli and Maeder, § 8 Unternehmensstrafrecht, in: Ackermann (ed.), Wirtschaftsstrafrecht der Schweiz, 2nd edition 2021, p. 206 N 27, according to which FSC 146 IV 68 E. 2.3 contradicts FSC 142 IV 333 E. 4.1

362 See also the special provision of Art. 24 para. 3bis NBA, whose content matches that of Art. 49 FINMASA

363 SR **958.1**

364 Art. 35 para. 1 and 2 FinMIA

Based on this competence, for example, SIX Swiss Exchange has published the Directive on Corporate Governance (DCG).[365] Issuers listed on SIX Swiss Exchange are obliged to publish information on corporate governance in a separate section of the annual report. All disclosures are subject to the "comply or explain" principle, according to which issuers who choose not to disclose must indicate this fact in their corporate governance report and provide a corresponding justification.[366]

Voluntary self-regulation
As regards voluntary self-regulation, the umbrella organisation economiesuisse has been publishing the Swiss Code of Best Practice for Corporate Governance since 2002. The text was substantially revised in February 2023.[367] The recommendations and guidelines contained therein cover topics such as risk management, compliance, financial monitoring and remuneration of the board of directors and executive board. While not legally binding, the Swiss Code is widely recognised in the market. Over the years, it has established itself as an important reference work on corporate governance for companies in Switzerland.

15.3 Individual accountability

15.3.1 Background
The FINMASA contains various instruments that also affect natural persons. However, in accordance with Article 3 letter a FINMASA, FINMA's focus as a supervisory authority is on the supervision of institutions, some of which may also be sole proprietorships. FINMA can also depart from the principle of institutional supervision and impose measures on employees of financial institutions who have caused a serious violation of supervisory provisions.[368] Measures against natural persons have become more important in practice since 2014, when FINMA officially stepped up its action against individuals for alleged serious violations of supervisory law, based on its revised enforcement policy.[369]

Some FINMA instruments are aimed directly at natural persons (see also section 16.3): the prohibition from practising a profession (Art. 33 FINMASA) and the prohibition from performing an activity (Art. 33*a* FINMASA). Confiscation (Art. 35 FINMASA) and a declaratory ruling (Art. 32 FINMASA), possibly combined with publication of the ruling and disclosure of the relevant personal data (Art. 34 FINMASA), may also directly affect a natural person. The fit and proper assessment and ultimately the withdrawal of recognition for guarantees of proper business conduct also have a direct impact on natural persons.

The existence of the measures and the credible threat of their use by FINMA have a preventive effect by incentivising the individuals potentially affected by them to avoid misconduct in their area of responsibility. In other words, these measures already establish individual responsibility and accountability.

However, in supervisory practice it is difficult, particularly in the case of large institutions, to prove that individuals have breached the rules (e.g. committed a serious violation of supervisory law or of internal rules). This is a prerequisite for the application of FINMA's sanction instruments aimed at individuals. An individual must have causally and culpably caused the violation.

[365] Directive on Information relating to Corporate Governance (DCG), 29 June 2022
[366] Art. 7 DCG
[367] Economiesuisse, Swiss Code of Best Practice for Corporate Governance, 6 February 2023
[368] Swiss Federal Supreme Court, 2C_929/2017, 23 April 2018, E. 2.1
[369] FINMA press release, New FINMA enforcement and communication policies, 30 October 2014

There have been various calls in the past to improve the assignment of individual responsibility to the most senior managers in FINMA-supervised institutions. One notable example is the Andrey Postulate "Make financial market senior executives more accountable with lean tools",[370] and the demand has been reiterated by various parliamentary procedural requests in the wake of the UBS takeover of Credit Suisse.[371] FINMA itself has also called for better individual accountability by means of a senior managers regime.[372,373]

15.3.2 International comparison

Internationally, since the 2007-08 financial crisis, some jurisdictions have developed approaches to hold individuals who are directly responsible for malpractice in financial institutions (especially banks) more accountable.

The UK regime has led the way here, as it was introduced comparatively early and is comprehensive in terms of the types of institutions and individuals it covers. Other such regimes exist in Hong Kong and Singapore, and a new regime was introduced in Ireland in 2023. The United States and the EU's Single Supervisory Mechanism (SSM) do not have a dedicated regime for establishing individual accountability.

15.3.2.1 Approaches in other jurisdictions

The following section presents various features of the international approaches to individual accountability.[374]

- **Authorisation of senior executives by the supervisory authority:** Authorisation is based on an assessment of fitness and properness (or propriety). This assessment is first performed when an individual is appointed to a position and in some cases on an ongoing basis, i.e. as part of a recurring review process undertaken either by the institutions themselves or by the supervisory authority.
- **Scope in relation to individuals:** The different approaches include different types of positions in an institution within their scope. Broadly speaking, the following distinctions can be made:
  - **Members of the board of directors:** In order to apply the senior managers regime, some regimes differentiate according to whether the board members are independent (non-executive directors), are affiliated with the institution (executive directors) or perform management functions on the board of directors as independent members (i.e. as chair of the board or chair of committees). Consequently, the senior managers regimes examined do not always apply to all members of the board of directors.
  - **Members of the executive board and other senior management positions:** The senior managers regimes examined do not include all members of the executive board as a matter of course. Rather, they define certain roles as being covered by the respective regime, regardless of whether the person concerned is a member of the executive board or not. For example, the Senior Managers Regime in the UK covers, among others, the roles of chief executive officer, chief finance officer, chief risk officer, chief operations officer and chief compliance officer. The same applies to Ireland, Hong Kong and Singapore. It should be noted in particular that the regimes generally do cover the role of head of internal audit. By definition, this is located neither in the board of directors nor in the executive board.
  - **Other positions below senior management level:** The UK and Irish regimes stipulate that individuals below senior management level who have far-reaching decision-making powers or who could expose the institution to significant risks ("material risk takers") must also be certified. In this case, however, the certification takes place via an internal assessment process at the institution rather than an authorisation from the supervisory authority.

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370 Postulate 21.3893

371 Motion 23.4336; motion 23.3462; interpellation 23.3417.

372 The term "senior managers regime" used here is based on models in other legal systems, for example the UK's Senior Managers and Certification Regime (SM&CR), or Senior Managers Regime (SMR) for short, the Individual Accountability Framework being introduced in Ireland, and the Manager-in-Charge regime in Hong Kong

373 See for example FINMA, FINMA media event: Address by Marlene Amstad, 5 April 2023; FINMA, FINMA Report – Lessons Learned from the CS Crisis, 19 December 2023

374 For a more detailed presentation, see also the PA Consulting report, especially pp. 20–31

- **Assignment of senior managers' individual responsibilities:** A central element of all approaches is the assignment of responsibilities in a regulatory responsibility document (e.g. the Statement of Responsibilities in the UK and Ireland). Some jurisdictions specify responsibilities in an institution that must be assigned to a particular individual (UK and Ireland).

- **Documentation of the institution's governance rules:** The jurisdictions examined require institutions to document the governance rules that apply within the institution (presented in "management responsibilities maps"). These rules cover, for example, the direct and indirect reporting lines that exist and the areas of responsibility applying within the institution as a whole.

- **Assignment of responsibility to an individual:** Another central element in a senior managers regime is the definition of how far an individual's responsibility extends. The UK's regulatory framework includes Conduct Rules, which require a senior manager to take all steps that can be reasonably expected of them to ensure that the business under their responsibility is subject to appropriate control and complies with regulatory requirements ("reasonable steps criterion").[375] Ireland's regime has analogous standards.

- **Scope of application with regard to institution type:** As a rule, the senior managers regimes in the jurisdictions examined apply to all firms that are prudentially supervised by the respective supervisory authority. This means that the regimes apply to banks, insurance companies, securities firms, etc. As a rule, the regulations provide for a certain degree of proportionality by subjecting smaller and lower-risk institutions to less stringent rules than larger and higher-risk ones. No jurisdiction restricts the scope to SIBs only.

- **Remuneration rules in senior managers regimes:** The rules for the payment of remuneration (in particular variable remuneration components) and the forfeiture or clawback of remuneration are managed outside the actual senior managers regimes in the jurisdictions examined, but are closely interlinked with them. These rules serve to ensure that the individuals subject to the regime who have violated the applicable rules suffer direct financial consequences. This creates a strong incentive for senior managers to avoid misconduct in their area of responsibility.

- **Enforcement of supervisory law in senior managers regimes:** If supervisory law is violated, the supervisory authorities in the jurisdictions examined have various instruments at their disposal to sanction misconduct. The threat of sanctions is an important means of deterring individual misconduct and makes individuals aware of the importance of their responsibility.

The EU does not have a regulatory senior managers regime. However, various pieces of legislation feature the elements described above, one notable example being the fit and proper assessments of members of management bodies carried out by the ECB when new authorisations are issued and when there are changes in the management bodies.[376] At member state level, Ireland has introduced a senior managers regime. Germany does not have such a regime, but does have rules that allow the Federal Financial Supervisory Authority (BaFin) to take action against institutions or individuals that have violated supervisory law.

The USA decided not to introduce a senior managers regime in the wake of the financial crisis. The main reason for this was that the competent US authorities at federal and state level already had far-reaching powers to take direct action against individuals at all hierarchical levels of an institution in the event of indications of misconduct. In the UK, which has the most developed senior managers regime, the prevailing view is that this regime has led to significant behavioural changes in the right direction.

15.3.2.2 Financial Stability Board toolkit

In 2018, the FSB published a toolkit designed to strengthen the governance framework in order to mitigate misconduct risk.[377] Aimed at financial institutions and supervisory authorities, it requires, among other things, that firms improve the assignment of individual responsibilities and that supervisory authorities enforce this.

[375] See for example Bank of England, Strengthening individual accountability in banking, Supervisory Statement SS28/15, December 2021, p. 36 f.

[376] ECB Banking Supervision, Fit and proper assessments, website

[377] FSB, Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors, 20 April 2018

In 2023, the FSB conducted a peer review in Switzerland, in which it examined the Swiss TBTF approach and made recommendations. One recommendation included introducing a senior managers regime.[378]

15.3.3 Assessment

Calls to improve the assignment of individual responsibility and accountability pre-date the Credit Suisse crisis, but have grown louder following insights from the latter. FINMA identified clear shortcomings in individual accountability in its report. In particular, it pinpointed a need for action on the part of the members of the Board of Directors and the Executive Board to ensure an appropriate risk and corporate culture.

The prevailing culture in a company is shaped to a large extent by the people at the most senior level of management. These individuals therefore have a special responsibility, particularly in the case of SIBs – and especially G-SIBs – not only towards their bank and its stakeholders, but also towards the Swiss economy and the Confederation.

Improving individual responsibility and accountability is therefore an understandable demand. While FINMA already has tools that affect individuals and could be expanded in certain areas (see section 16.4), Switzerland does not yet have a supervisory instrument in the form of a senior managers regime.

Such a regime could make a significant contribution to strengthening the TBTF regime and to the stability and integrity of the Swiss financial centre in general. In line with political demands, it would have to fit into Switzerland's current regulatory framework and hold the responsible individuals to account in an unbureaucratic way.[379]

15.3.4 Possible measure

As a possible measure, a senior managers regime could be introduced and enshrined as an explicit organisational requirement at the legislative level. The specifics would be regulated at ordinance level. In principle, such a regime could be introduced for internationally active SIBs, for all SIBs, for all banks or, if appropriate, for other financial institutions.

15.3.4.1 Objective of a senior managers regime

A senior managers regime should ensure the clear assignment of responsibilities, particularly to individuals at senior management levels.[380] This objective entails not only a clear definition of the responsibilities, but also an obligation to fulfil them. One important responsibility is that executives have a duty to prevent misconduct in their area of responsibility.

To enforce this, individuals should be given the right incentives, meaning that if they breach an obligation, they must expect a sanction to be imposed, either by the institution itself (e.g. a reduction in variable remuneration) or by the supervisory authority (e.g. an industry ban). The assignment of responsibilities thus also makes it easier to hold individuals accountable by means of sanctions. For the supervisory authority, it means that it is easier to prove individual responsibility.

In implementing a senior managers regime, care must be taken to ensure that the cost and effort for the institutions concerned are kept within strict limits and that the institutions themselves can benefit from it.

15.3.4.2 Documentation of responsibilities

The responsibilities of an individual subject to the senior managers regime must be appropriately documented based on the relevant regulatory requirements, updated as required and submitted to FINMA if necessary. The documentation ensures that the institutions themselves are clear about which responsibilities are assigned to which individuals and that the individuals responsible for misconduct can be more easily held accountable.

15.3.4.3 Group subject to the senior managers regime

The senior managers regime must be aimed at individuals at senior management level. This includes those covered by the current fit and proper assessment regime, which typically include the members of the supreme governing body and the management body, i.e. the board of directors and the executive board in the case of a company limited by shares.

[378] FSB, Peer Review of Switzerland, 29 February 2024

[379] Postulate 21.3893

[380] See Oliveira, Walters and Zamil, When the music stops – holding bank executives accountable for misconduct, FSI Insights No 48, 23 February 2023

At large institutions in particular, it makes sense for the group subject to the senior managers regime to also include individuals below the level of the management body, as their responsibilities may include far-reaching decision-making powers. It should also be possible to adopt a flexible approach to the target group so that appropriate account can be taken of the institution's management structures. Linking the individuals covered by the senior managers regime with the fit and proper assessment regime would also appear to be worth examining.

15.3.4.4 Standard of due diligence
The legal basis must clarify the extent of an individual's responsibility for their area of responsibility. In other words, a standard of due diligence should be introduced that defines the scope of the individual's duties. This standard would require individuals to do everything necessary and reasonably to be expected of them in order to avoid misconduct. This rule corresponds to the reasonable steps criterion in the UK Senior Managers Regime.

15.3.4.5 Link to remuneration rules
Individuals who breach their responsibilities should be sanctioned financially in the form of an intervention in the level of their remuneration. This intervention is to be performed by the institution, either directly or – if the institution refuses – on an order from FINMA. A clear legal basis should be established so that FINMA can issue such an order.

15.3.4.6 Implementation issues to be clarified
When developing a senior managers regime taking into account experiences in other countries, a number of issues need to be clarified, in particular:[381]

- Territorial scope: Should the regime apply only within Switzerland or also in other countries where an institution operates? How should senior managers regimes to which individuals are subject abroad be taken into account in a possible Swiss approach to such a regime?

- Proportionality: How should the rules be designed for different institutions according to their size and risks?

- Documentation requirements: What should institutions be required to document regarding the assignment of responsibilities? What documents would they have to submit to FINMA?

- Supervision of compliance with the rules: To what extent are the institutions themselves responsible for monitoring and applying the rules? What control processes are needed? What tasks does FINMA perform?

- Interfaces with other supervisory issues: What links are there to the rules on remuneration or the fit and proper assessment?

- Enforcement of supervisory law: Are FINMA's enforcement tools geared towards the introduction of a senior managers regime?

- Effects on other areas of law: What are the implications with regard to private-law and criminal-law responsibilities?

15.4 Remuneration

15.4.1 Background
The remuneration of managers and specialists has always been a central issue in the corporate governance of financial institutions. Remuneration systems can have a significant impact on the success of a financial institution. If designed appropriately, they can boost employee motivation and performance, and ultimately the success of the firm, in a sustainable way. An inappropriately designed remuneration system, on the other hand, harbours the risk of moral hazard by creasing false incentives that can lead to short-term profit-seeking and excessive risk-taking, potentially undermining the firm's long-term success. This was borne out by the Credit Suisse crisis.

In financial institutions, remuneration systems are also instruments of risk control. For this reason, efforts have been made worldwide to regulate remuneration at financial institutions, particularly in the wake of the 2007-08 financial crisis.

In Switzerland, a distinction must be made between two regulatory approaches. The remuneration of senior executives at listed companies limited by shares (which includes the majority of financial institutions) is governed by private law or the Swiss Code of Obligations, while the remuneration systems of banks, insurance companies and financial institutions in other sectors are included in FINMA's supervisory activities.[382]

[381] The information that follows is based on the recommendations of the PA Consulting expert opinion. See PA Consulting, p. 33 ff.
[382] FINMA, Minimum standards for remuneration schemes of financial institutions, Circular 2010/1, Remuneration schemes, 21 October 2009

15.4.1.1 Regulation in private law

The principles governing the remuneration of members of the management bodies of listed companies limited by shares are set out in Article 95 paragraph 3 of the Federal Constitution and include an annual vote by the general meeting on the total amount of all remuneration of the board of directors, the executive board and the board of advisors. As such, Switzerland has some of the strongest "say-on-pay" rules of any jurisdiction.

Furthermore, severance payments, advance payments and other special remuneration to governing officers are prohibited. In addition, the amount of credits, loans and pensions payable to governing officers, their profit-sharing and equity participation plans and the number of mandates they may accept outside the group, as well as the duration of employment contracts of members of the executive board, must be regulated in the articles of association. Persons violating these provisions are liable to both a custodial sentence and a monetary penalty.

This constitutional provision was fleshed out and implemented by the Ordinance of 20 November 2013 against Excessive Remuneration in Listed Companies Limited by Shares[383] (ERCO), which was transposed into the Code of Obligations as part of the revision of the law on companies limited by shares.[384] The measures can be divided into three regulatory areas: transparency through the remuneration report (Art. 734–734f CO), shareholders' co-determination rights in votes on remuneration at the general meeting (Art. 735–735b CO) and the prohibition of unauthorised remuneration (Art. 735c and 735d CO).

There are also complex rules on variable remuneration, arising mainly from case law, which place limits on firms' flexibility, particularly if variable remuneration is categorised as a salary component and not as a bonus.[385]

15.4.1.2 Regulation in financial market law

There are no provisions at the legislative or ordinance level that specifically regulate the handling of remuneration in the event of violations of supervisory law. Only where SIBs and their group holding companies receive state aid from federal funds is the Federal Council authorised to impose measures in regard to remuneration in accordance with Article 10*a* BankA. In particular, these may include prohibiting the payment of variable remuneration and prescribing adjustments to the remuneration system.

In the future, it should also be explicitly possible for the Federal Council, under certain conditions, to oblige a SIB that has received state aid from federal funds to claw back variable remuneration that has already been paid out (Art. 10*a* para. 2 let c Draft BankA).[386] Article 25 of the Financial Services Ordinance of 6 November 2019[387] (FinSO) contains provisions on remuneration systems for financial service providers. These remuneration systems should create no incentives for staff to disregard statutory duties or to conduct themselves in a manner detrimental to customers.

Swiss law does not currently provide for the clawback of remuneration that has already been paid out, aside from the specific case of state aid.

FINMA's circular on remuneration schemes (Circ. 2010/1)[388] represents the codified supervisory practice on remuneration systems at financial institutions, setting minimum standards for design, implementation and disclosure in this area. Financial institutions389 above a certain size (measured in terms of required capital or target capital) must implement the circular. However, deviations from the minimum standards are possible if they are justified and disclosed ("comply or explain" approach).

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[383] SR **221.331**

[384] Art. 732–735d CO

[385] For a more detailed overview, see Geiser, Rechtsprechungspanorama Arbeitsrecht, in: Aktuelle Juristische Praxis 2021, p. 1407 ff.

[386] Geschäft des Bundesrates 23.062

[387] SR **950.11**

[388] FINMA, Minimum standards for remuneration schemes of financial institutions, Circular 2010/1, Remuneration schemes, 21 October 2009

[389] Banks, securities firms, financial groups and conglomerates which, in their capacity as a single entity or at the financial group or conglomerate level, are required to hold equity capital in the amount of at least CHF 10 billion. Insurance companies, insurance groups and conglomerates which, in their capacity as an insurance company or at the insurance group or conglomerate level, are required to hold equity capital amounting to at least CHF 15 billion in line with the risks to which they are exposed

The board of directors is responsible for the design and implementation of a financial institution's remuneration policy. It issues remuneration rules that cover all people employed by the firm. The structure and level of total remuneration must be aligned with the firm's risk policies and be designed so as to enhance risk awareness.

The allocation of variable remuneration to individual units and persons must depend on sustainable and justifiable criteria that reflect the firm's business and risk policies. According to the circular, remuneration should be in proportion to a person's strategic or operational responsibility and the risks they take or are responsible for. All significant risks attributable to a person's sphere of influence, including the organisational units under their responsibility, must be considered in this context. Neither the nature of the remuneration nor the criteria applicable for its allocation must create any incentive for taking inappropriate risks or for violating applicable law, regulations, internal rules or agreements.

According to the FINMA circular, deferrals should link remuneration with the future development of the firm's performance and risks. Deferred remuneration must be structured in such a way as to promote optimally the risk awareness of the beneficiaries and encourage them to operate the business in a sustainable manner. The time period should be based on the time horizon of the risks for which the beneficiary is responsible. For members of senior management and persons with relatively high total remuneration, as well as persons whose activities have a significant influence on the risk profile of the firm, the time period should be at least three years.

The greater the responsibility of a beneficiary and the greater their total remuneration, the greater the percentage of their remuneration that is to be deferred. For members of senior management, for persons with relatively high total remuneration and for persons whose activities have a significant influence on the risk profile of the financial institution, a significant percentage of remuneration is to be subject to deferred payment.

The circular sets out how a culture of greater individual, entrepreneurial responsibility can be promoted and individual misconduct reduced at senior management level. However, compared with the FSB guidelines and the mechanisms in other jurisdictions (e.g. the EU), the FINMA circular is brief and general. There is no reference to corporate culture or any mention of non-financial assessment criteria (e.g. quality of risk management, compliance with the firm's rules of conduct).

15.4.1.3 Taxation of remuneration

Under current law, all income from employment as an employee is subject to income tax and social security contributions, regardless of whether the income is paid as fixed or variable remuneration or a mix of the two. There is also no differentiation according to income level, aside from the usual progressive tax rates. A firm can deduct labour costs from its net profit as a business-related expense, thereby reducing its tax burden.

The current law provides for equal taxation in line with economic performance. In the years following the 2007-08 financial crisis, the additional taxation of high remuneration was a recurring topic of political debate. Numerous parliamentary procedural requests were submitted on this issue but were regularly rejected by Parliament.[390]

15.4.2 International comparison

15.4.2.1 Financial Stability Board

At international level, the FSB has published guidelines on corporate governance. As part of its work to reduce misconduct risk, in 2018 it issued "Supplementary Guidance to the FSB Principles and Standards on Sound Compensation Practices – The use of compensation tools to address misconduct risk" as a supplement to the existing compensation principles[391] from 2009.[392] This states that the board of directors is responsible for an appropriate remuneration system. The board should oversee and senior management should implement such a system.

[390] For example: parliamentary initiative 08.523; motion 09.4089; motion 10.3351

[391] Financial Stability Forum, FSF Principles for Sound Compensation Practices, 2 April 2009

[392] FSB, Supplementary Guidance to the FSB Principles and Standards on Sound Compensation Practices, The use of compensation tools to address misconduct risk, 9 March 2018

The risk appetite defined by the board of directors must be clearly and comprehensibly broken down by business area and reflected in the remuneration of the persons responsible, thereby making these individuals accountable for their own conduct. The board of directors should oversee and hold senior management accountable for implementing and participating in the design of compensation programmes that effectively contribute to preventing and remediating misconduct. Non-financial assessment criteria (e.g. quality of risk management, compliance with the firm's rules of conduct) should ensure the sustainable alignment of employee behaviour with the business strategy, values and culture of the firm.

In addition to the reduction or forfeiture of (deferred) variable remuneration (malus), the clawback of remuneration already paid out is also provided for as a specific measure in the event of misconduct. The FSB proposes clear criteria for this.

15.4.2.2 Significant national regulations

The SIF commissioned an expert opinion on remuneration regulations from Winfried Ruigrok and Wei Lin of the University of St Gallen. This includes a comprehensive presentation of regulatory approaches in a number of jurisdictions and addresses various aspects of remuneration regulation. Based closely on this opinion, some aspects of national regulations are set out below.[393]

Clawbacks

In the wake of the 2007-08 financial crisis, clawbacks in particular have become widely established internationally. In the United States, a mandatory, albeit restrictive, clawback provision was introduced with the Sarbanes-Oxley Act of 2002, according to which the possibility of a clawback exists only for compensation paid to the CEO or CFO and if an accounting restatement has to be prepared as a result of misconduct.[394] Enforcing these clawbacks is the responsibility of the supervisory authority, the SEC, and not the firms concerned. The Dodd-Frank Act of 2010 proposed a broader performance-based clawback requirement that would apply to all senior executives and would not require misconduct. However, the provisions implementing this more comprehensive clawback requirement have not yet come into force. Other forms of clawback can also be found in other legal systems.

Deferral by means of retention periods for variable remuneration

Deferred remuneration is the portion of compensation that the firm allocates to the employees concerned but sets aside to be paid at a later date. Payment is conditional upon certain conditions being met after an observation period (e.g. achievement of earnings targets, compliance with internal regulations).

Practices in the individual jurisdictions vary with regard to retention periods and the proportion of variable remuneration to which deferral periods apply. The USA has set neither minimum deferral periods nor percentages. By contrast, the EU and the UK have stipulated a minimum period of four to seven years for a significant percentage of deferred variable remuneration.

Caps on variable remuneration in relation to fixed remuneration

Some jurisdictions have set bonus caps, i.e. upper limits on variable remuneration in relation to fixed remuneration. In the EU, since 2014 the Capital Requirements Directive[395] has laid down rules on bonus payments to employees, with the aim of preventing credit institutions from paying bonuses to their employees in order to encourage excessive risk-taking. The directive sets a maximum ratio between fixed remuneration and bonuses for all relevant employees. The bonus payment must not exceed the employees' annual basic fixed remuneration, although the general meeting may authorise bonus payments of twice the basic remuneration subject to certain conditions.

Following Brexit, the UK rejected a blanket application of bonus caps, as provided for in the EU's Capital Requirements Directive. The caps on variable remuneration were removed at the end of October 2023.[396] The financial

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[393] Ruigrok and Lin report, pp. 9–12

[394] Section 304 Sarbanes-Oxley Act 2002, 15 U.S.C. § 7243 (2002)

[395] Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176 of 27 June 2013, p. 338

[396] Bank of England, Remuneration: Ratio between fixed and variable components of total remuneration ('bonus cap'), PRA Policy Statement 9/23, 24 October 2023

market authorities, the FCA and the PRA, argued that abolishing caps based on a ratio between fixed and variable remuneration would make the remuneration system more effective as it would increase the proportion of remuneration that institutions could use to incentivise employees, e.g. by means of deferred, performance- and risk-based remuneration instruments. Over time, they also expect the changes to remove an unintended consequence that had arisen as a result of the existing regime, namely growth in the proportion of the fixed component of total remuneration, which reduces firms' ability to adjust costs to absorb losses in a downturn.[397]

Say-on-pay rules
Regulations requiring firms to give shareholders a vote on executive remuneration at the annual general meeting are widespread. Of the countries with significant financial markets, only Hong Kong and Singapore have not introduced such rules. Say-on-pay provisions are typically enshrined in company law and take a variety of forms.

Shareholder votes on remuneration may be mandatory or voluntary for the firms concerned, while the result of the vote may be binding or recommendatory. In 2011, the US supervisory authority, the SEC, introduced legislation providing for mandatory but purely advisory say-on-pay votes. Similarly, in Germany and Canada, the shareholders' vote is only recommendatory. However, in the UK, the Netherlands, Spain and France, say-on-pay rules are both mandatory and binding.

15.4.3 Assessment

Remuneration systems have become an established tool for incentivising the employees of financial institutions to enhance the firm's performance. However, it is important that remuneration systems do not create false incentives in the way that variable remuneration components are awarded. Banks' remuneration systems come in for regular criticism in this respect, notably during the Credit Suisse crisis.

According to FINMA's report,[398] the development of variable remuneration at Credit Suisse primarily followed the developments in the market, with business performance playing only a secondary role. The high variable remuneration in loss-making years, the sometimes insufficient repercussions of misconduct on individual remuneration, and the exclusion of what the bank deemed to be extraordinary events when setting the variable remuneration encouraged the development of a risk culture that was not sufficiently aligned with corporate responsibility. Against this backdrop, following the takeover of Credit Suisse by UBS, there were numerous parliamentary procedural requests calling for regulation of remuneration or restrictions on variable remuneration.[399]

The Federal Council believes that remuneration systems should be used as an effective instrument to support corporate governance and sustainable corporate success. The legal framework must be designed with this in mind. Aside from Article 10*a* BankA (measures relating to remuneration in the event of state aid from federal funds) and Article 25 FinSO, there is no explicit legal basis in Swiss supervisory law for requirements concerning the remuneration systems of financial institutions and interventions options for the supervisory authority. The FINMA circular is based on general standards relating to organisation and, as a codified supervisory practice, is not legislative in character.[400] It is general in nature and does not, for example, cover all aspects of the corresponding FSB principles.

A parliamentary motion[401] has also been tabled calling for an amendment to the BankA on the basis of Article 10a BankA, so that the Federal Council can order measures to mitigate social impacts for employees or to preserve jobs, in cases where state aid is granted. When state aid is involved, however, the priority is the recovery of the SIB, which represents an overriding public interest (i.e. safeguarding financial stability). Article 10a BankA is intended to ensure that the federal funds deployed are not used to pay variable remuneration. State aid from federal funds would serve the overriding objective of safeguarding financial stability and already counteract the uncontrolled loss of jobs. Further measures to mitigate the social impacts are undertaken by the social partners.

[397] Bank of England, Remuneration: Ratio between fixed and variable components of total remuneration ('bonus cap'), PRA Consultation Paper 15/22, 19 December 2022, section 1.4

[398] FINMA, FINMA Report – Lessons Learned from the CS Crisis, 19 December 2023, p. 49

[399] Examples: motion 23.3494, motion 23.3462, motion 23.3452, motion 23.3495, postulate 23.3443, postulate 23.3442

[400] Art. 5 para. 2 of the Ordinance of 13 December 2019 on the Financial Market Supervision Act (SR **956.11**)

[401] Motion 23.3458

15.4.4 Possible measures

15.4.4.1 Legal basis for remuneration system requirements

Introducing an explicit legal basis would allow the basic requirements for remuneration systems and the supervisory authority's intervention options to be defined and strengthened. This measure involves raising selected provisions of the circular on remuneration to a higher regulatory level. Specific legal provisions would strengthen the requirements for institutions to set up comprehensive and targeted remuneration systems that incentivise the prevention of misconduct.

In this context, it is important to establish a compelling connection between the remuneration provisions and the institution's risk-taking. The remuneration rules should also tie in with the corporate culture and include non-financial assessment criteria in order to sustainably align employee behaviour with the business strategy, values and culture of the firm as well as supervisory requirements. Furthermore, the remuneration provisions should be linked to a possible senior managers regime. In addition, as regards deferred remuneration components, the remuneration systems should ensure that structuring the payment over time is not a means of tax optimisation. In terms of their timing also, deferred payments must be geared solely towards the goal of incentivising risk-appropriate action.

15.4.4.2 Sanctioning misconduct by means of remuneration-related measures

Institutions would be obliged by a clear regulatory requirement to take disciplinary action if they identify misconduct on the part of individuals, for example by means of reductions in the variable remuneration awarded, clawback of remuneration already paid, non-promotion or demotion. If the institution fails to take any or adequate disciplinary action, FINMA may force it to do so. This measure has the advantage of improving corporate governance, with responsibility for monitoring and sanctioning being primarily borne by the institutions, and FINMA only intervening on a subsidiary basis.

15.4.4.3 Clear conditions for payment of variable remuneration

Another measure would be to introduce clearer and stricter rules stipulating that variable remuneration is determined on the basis of risk and offers appropriate incentives, thereby promoting risk-responsible behaviour. This means that, as well as the question of whether an institution, business line, department or employees have met financial targets, the question always arises as to the risks taken and the business conduct involved in achieving these targets. This discourages employees from acting in a way that is geared towards short-term profit optimisation.

This objective can be achieved by linking performance-related instruments to meaningful indicators. For example, variable remuneration components are to be paid out as long as the CET1 ratio exceeds market expectations or the level of liquidity is above the requirements for SIBs as laid down in the LiqO. Institutions should also base their remuneration instruments on qualitative requirements in terms of compliance with behavioural principles and guidelines, and ensure that significant misconduct results in the complete forfeiture of variable remuneration.

15.4.4.4 Extending deferrals of variable remuneration by introducing retention periods

By delaying the payment of variable remuneration components, this measure would minimise misconduct risk while also encouraging employees to stay longer at the same institutions, thus enabling performance to be monitored for longer. This also means that there is more time to cancel bonuses that have already been allocated but not yet paid out (malus), i.e. clawbacks (see following option) become surplus to requirements as the retention period increases.

Finally, extending the deferral of variable remuneration through the introduction of retention periods would also bring Switzerland into line with many other legal systems. However, there is empirical evidence that extending the retention period could ultimately lead to higher remuneration for the most senior executives.[402]

[402] Ruigrok and Lin report, p. 36 f.

15.4.4.5 Introducing clawbacks

Introducing clawbacks means that remuneration that has already been paid out can be reclaimed under certain conditions. This would be done by the institutions themselves, either of their own accord or on the orders of the supervisory authority. Clawback provisions can discourage excessive risk-taking while appealing to the public's sense of fair play.

However, the positive effects of such provisions should not be overestimated. Firstly, the empirical evidence on the impact of clawbacks is limited and is primarily based on data from the USA and from industries outside the financial sector. Secondly, there is some evidence that clawback provisions lead to higher executive remuneration. Thirdly, clawback provisions have only been successfully enforced in a few cases in the financial industry worldwide, due to numerous legal challenges.[403]

15.4.4.6 Capping variable remuneration

Introducing caps on variable remuneration in relation to fixed remuneration reduces managers' willingness to take risks. However, there is empirical evidence that such measures have the unintended consequence of increasing fixed remuneration and thus the firm's fixed costs, giving it less scope to cut costs, particularly in times of crisis. It is also possible that capping variable remuneration could eliminate its positive effects on entrepreneurial activity, resulting in firms not performing to their full potential. Another risk with introducing a cap is that talented employees could move to locations where no such restriction exists, or be employed in another location and seconded from there to Switzerland.[404,405]

These considerations apply mutatis mutandis to a ban on variable remuneration, which could be considered as an extreme form of capping.

15.5 Conclusion and proposed mix of corporate governance measures

Although the topics of corporate governance generally, individual accountability and remuneration are analysed individually above, the measures need to be assessed in a way that encompasses all three topics since there are interdependencies between them. In particular, appropriate corporate governance in an institution is a prerequisite for the meaningful assignment of individual responsibilities and the suitable design of remuneration systems. A senior managers regime makes responsibilities explicit and clear, which, particularly in large financial institutions, makes it easier to design a remuneration system tailored to these responsibilities and also allows the supervisory authority to demand accountability and/or penalise violations thereof.

Against this background, the Federal Council considers the following mix of measures to be appropriate:

- For SIBs and potentially all banks, the legal basis for corporate governance requirements should be tightened up and fleshed out, as it is not very well developed in relation to banks – compared with the FinIA, for example (see possible measure in section 15.2.4). Tightening up the legal framework in this way would effectively address the current shortcomings and also be in line with regulations abroad.

- For SIBs in particular, a senior managers regime should be introduced in accordance with the measure in section 15.3.4. This requires corporate governance requirements to be fleshed out. A senior managers regime is intended to ensure that responsibilities are assigned and documented at senior management level. Those responsible can be identified and sanctioned more easily in the event of misconduct. Where sanctions are concerned, the focus is on remuneration-related measures taken by the bank itself, which is why the senior managers regime must be closely interlinked with the remuneration system.

[403] Ruigrok and Lin expert opinion, p. 36

[404] Ruigrok and Lin expert opinion, p. 30

[405] Ammann et al., Reformbedarf in der Regulierung von «Too Big to Fail» Banken, 19 May 2023, p. 35

- The legal basis for requirements for remuneration systems at SIBs, and possibly banks in general, must be strengthened to prevent false incentives and ensure that remuneration systems are closely aligned with economic success and do not favour excessive risk-taking. The focus is on the banks themselves penalising misconduct through remuneration-related measures. Only if the institution fails to do this should FINMA intervene. In particular, it should be possible to retain variable remuneration for longer and cancel it ("malus") or, if it has already been paid out, claw it back. However, capping variable remuneration would not be effective. The empirical evidence points to disadvantages.[406] In particular, a cap is likely to increase fixed salaries. When implementing remuneration system requirements, the relationship between the new provisions and existing labour law provisions must be clarified.

Implementation of these measures and, in particular, of the senior managers regime should focus on SIBs, due to the far-reaching consequences of the failure of such firms. For all three measures, however, the extent to which proportional implementation would be appropriate for other categories of banks, or for all banks, should be examined during implementation. These measures will have a strong preventive effect and contribute significantly to protecting the system and individuals (see Art. 4 FINMASA). Corporate governance requirements are also considered as organisational requirements and therefore as licensing requirements that every bank must, in principle, fulfil. The better a bank's existing risk management set-up, the more likely it is that it already meets these requirements.

During implementation, it must be ensured that the requirements for supervised institutions differ substantially depending on their size, complexity and risk profile. In other words, small and low-risk banks with a simple business model should be subject to minimal requirements, while large and risky institutions with a heterogeneous business and organisational model must expect stricter obligations. When implementing a senior managers regime in particular, attention must be paid to ensuring a high level of efficiency and, if implementation extends beyond the SIBs, also to proportionality, since such a regime, as a new regulatory concept, could potentially entail high costs compared with the benefits if not implemented appropriately.

[406] Ammann et al., Reformbedarf in der Regulierung von «Too Big to Fail» Banken, 19 May 2023, p. 35; Ruigrok and Lin expert opinion, p. 4

16 Toolkit and other supervisory topics

16.1 Introduction

A key element of the TBTF regime is effective supervision. Against this background, this chapter discusses possible adjustments to the supervisory toolkit, as well as other topics that can contribute to strengthening supervision. While the topics in chapter 15 focus on promoting corporate governance at the supervised institutions, the following discussion is aimed at strengthening supervision, which can lead indirectly to improved corporate governance at the supervised persons and entities.

Although the main focus is on the supervision of SIBs, the discussion of other supervisory topics is naturally not limited to SIBs, but also includes non-systemically important banks and other financial institutions.

The following topics are discussed below:

- *Information for the general public* (section 16.2) and *pecuniary administrative sanctions* (section 16.3): Following the takeover of Credit Suisse by UBS, FINMA publicly expressed the wish to be able to provide more information about its enforcement activities and to have the power to impose pecuniary administrative sanctions ("fines").[407] The demand for pecuniary administrative sanctions can also be found in the Birrer-Heimo postulate.[408]

- *Instruments for establishing the accountability of institutions and individuals* (section 16.4): Existing supervisory instruments can be adapted in certain areas to improve the accountability of supervised institutions and individuals. These include the prohibition from practising a profession, confiscation, the fit and proper assessment, the duty to provide information and to report under the FINMASA, and whistleblowing.

- *Use of audit companies* (section 16.5): The audit of compliance with the provisions of the financial market acts is largely carried out through the use of audit companies. The question arises of the extent to which the legal framework for their use needs to be adapted.

- *Duration of procedures* (section 16.6): The duration of procedures to enforce supervisory law can be problematic, particularly in the case of SIBs. It should be examined to what extent this duration can be shortened.

- *Responsibility of the FINMA Board of Directors* (section 16.7): The decisions of the FINMA Board of Directors include matters of substantial importance. It should be examined whether this responsibility of the FINMA Board of Directors is appropriate.

- *FINMA resources* (section 16.8): The adequate resourcing of FINMA is a prerequisite for effective supervision, especially as regards the supervision of SIBs. FINMA is responsible for ensuring that it has adequate resources.

Sections 16.2 to 16.6 show possible measures for each of the topics covered. The measures are each assessed by weighing up their advantages and disadvantages. A conclusion is drawn at the end of each section, and a proposal is made with regard to the individual measures. Measures are recommended for implementation if the conclusion is predominantly positive; recommended for review if further analysis is required; or not recommended for implementation if the conclusion is predominantly negative. For some measures, as the results of the PInC must be awaited and taken into account.

16.2 Information for the general public

16.2.1 Background

In the current Financial Market Supervision Act (FINMASA), two different articles deal with the publication of information relating to FINMA's supervision: Article 22 FINMASA and Article 34 FINMASA.

16.2.1.1 Information for the general public pursuant to Article 22 FINMASA

On the basis of Article 22 FINMASA, FINMA informs the general public about its supervisory activity and supervisory practices. This provision is intended solely for information and transparency purposes and does not constitute a FINMA measure. In paragraph 1, it imposes on FINMA a regular duty to provide general, aggregated information.

[407] See, for example, FINMA, FINMA media event: Speech by Marlene Amstad, 5 April 2023; FINMA Report: Lessons Learned from the CS Crisis, 19 December 2023

[408] Postulate 21.4628

The naming and shaming measure discussed below (Art. 34 FINMASA), which requires the corresponding ruling to have taken legal effect, must be distinguished from FINMA's communication on proceedings under Article 22 FINMASA. As a rule, FINMA does not provide information on individual proceedings unless there is a particular need for an exception from a supervisory point of view (paragraph 2). This applies in particular if the information is necessary:

- for the protection of market participants or the supervised persons and entities;
- to correct false or misleading information;
- to safeguard the reputation of Switzerland's financial centre.

FINMA must also provide notice of the termination of proceedings if it has previously provided information on the proceedings.[409] Moreover, Article 22 FINMASA must not be used as a basis for information in order to penalise an institution or a person. The sole objective should be the general public's need for transparency and information.[410] FINMA must take account of the personality rights of those concerned.[411]

The media's interest in the actual or alleged misconduct of banks and their employees is always great.[412] Accordingly, regular conflicts of interest arise between the public's interest in being adequately informed about any irregularities and the interests of those affected as to whether, how and when they are mentioned in the media in the context of FINMA enforcement proceedings.[413]

Because information for the general public is considered a sensitive issue, not only is it crucial whether and how FINMA provides information on proceedings. The timing of the information can also have a significant impact on the share price of listed institutions and may trigger ad hoc publicity obligations for the institution concerned, which may also be a reason for FINMA to provide information itself immediately.[414] Against this background, FINMA is hesitant to rely on the exemption set out in the act which allows it to provide public information on individual proceedings.[415]

When communicating on proceedings, FINMA must avoid making prejudicial statements, even though the media interest may be very high. Any publication must be preceded by an investigation of the facts and an appraisal of the key aspects.[416]

16.2.1.2 Publication of the supervisory ruling pursuant to Article 34 FINMASA

Following the conclusion of enforcement proceedings, FINMA may publish a ruling in the sense of naming and shaming if 1) there has been a serious violation of supervisory provisions, 2) the ruling has taken full legal effect and 3) notice of publication is contained in the ruling itself. Due to the considerable consequences that such a publication can have for the persons and entities concerned, both the legislator and the courts set strict limits on this supervisory sanctioning tool for reasons of proportionality and the protection of privacy.[417] Accordingly, FINMA publishes only a small proportion of its rulings on the basis of Article 34 FINMASA, primarily for warning purposes with regard to unauthorised activity.[418]

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409 Art. 22 para. 3 FINMASA

410 Beck, Enforcementverfahren der FINMA und Dissonanz zum nemo tenetur-Grundsatz, in: Zobl et al. (eds.), Schweizer Schriften zum Finanzmarktrecht, Zurich 2019, p. 166, para. 423

411 Art. 22 para. 4 FINMASA

412 In some months, FINMA receives more than 100 enquiries from journalists; see Wyss and Zulauf, Informationsmittel, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, pp. 495 f.

413 Wyss and Zulauf, Problematik der FINMA-Kommunikation, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, pp. 483 f.

414 Wyss and Zulauf, Problematik der FINMA-Kommunikation, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 490 ff.

415 Wyss and Zulauf, Rechtsmittel gegen die FINMA, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 501, and the ratio discussed therein of 64 pieces of information pursuant to Art. 22 para. 2 FINMASA compared to a total of about 500 enforcement rulings in the period from 2009 to 2022

416 Wyss and Zulauf, Policy und Praxis der FINMA zur Kommunikation, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 493

417 Kuhn, Veröffentlichung einer Verfügung und Unterlassungsanweisung, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 386, and FSC 2C_318/2020, E. 4.1.2, according to which a one-off, selective and minor breach of financial market law obligations does not justify such a measure. In addition, the courts require that the publication be limited in terms of subject matter, territory, time and person, see FSC 2C_92/2019, E. 5.4.3.1

418 Abegglen and Schaub, Intransparentere FINMA-Praxis, SZW/RSDA 5/2020, p. 576

16.2.2 International comparison

16.2.2.1 Germany

BaFin pursues a more extensive information practice than FINMA. Various financial market acts provide for BaFin to regularly make measures public that are taken against companies or managers as well as decisions imposing fines, naming the company or person in question.[419] The wording of the relevant legal provisions is such that publication takes place on a regular basis, with certain formulations granting BaFin discretion with regard to publication.[420] The legislation also stipulates that the measures must be published on an anonymous basis or postponed if certain conditions are met.[421] BaFin also publishes notices against companies on its website if it suspects or has determined that a company is operating without authorisation.[422]

16.2.2.2 United Kingdom

In the UK, the FCA and the PRA are also obliged in principle to provide information about certain decisions, naming the person or entity in question.[423] The FCA publishes statutory notices, in particular warning notices, decision notices and final notices.[424] Decisions do not have to be published if, in the opinion of the FCA, their publication is "unfair" to the person with respect to whom the action was taken, prejudicial to the interests of consumers or detrimental to the stability of the UK financial system.[425]

In principle, the legal principles set out for the FCA also apply to the PRA. Here too, publications are exempt which, in the PRA's opinion, are "unfair" to the person with respect to whom the action is taken, prejudicial to the safety and soundness of the companies supervised by the PRA or prejudicial to securing the appropriate degree of protection for policyholders.[426]

16.2.2.3 United States

The Federal Reserve System (Fed) in the USA has a comprehensive information policy on enforcement actions against banks and individuals.[427] An analogous approach is taken by the Office of the Comptroller of the Currency (OCC)[428] and the Federal Deposit Insurance Corporation (FDIC).

16.2.2.4 Singapore

The Monetary Authority of Singapore (MAS) may, in such form or matter as it considers appropriate, publish such information as MAS may consider necessary or expedient to publish in the public interest.[429] MAS has the authority to publish information regarding enforcement actions.[430] Accordingly, it is at the discretion of MAS to publish information regarding any enforcement action if MAS considers publication to be necessary or expedient in the public interest. MAS also has the option to publish investigative measures. In addition, it maintains a list with which it warns investors about certain providers or offers.[431]

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419 For example, § 60b para. 1 of the Banking Act (KWG), § 84 para. 1 of the Investment Firm Act (WpIG) and § 57 para. 1 of the Money Laundering Act (GwG)

420 Note that the wording in the legislative texts is not uniform, and the articles mentioned may differ slightly from one another. See, for example, § 60b of the Banking Act; § 341a para. 1 No 1 of the Investment Code (KAGB), where para. 1 No 2 is written as an optional formula and the addressee of the measure is informed prior to publication; § 123 para. 1 of the Securities Trading Act (WpHG), which is formulated as an optional formula and publication must be appropriate and necessary to eliminate or prevent the irregularities; § 319 of the Insurance Supervision Act (VAG), which provides that publication takes place if it is required considering the relevant interests in order to rectify or prevent irregularities, and § 57 GwG

421 Publication is made on an anonymous basis if doing so ensures effective protection of personality rights. If publication is made on an anonymous basis and it is foreseeable that the reasons for doing so will cease to apply within a reasonable period of time, publication may be postponed (see § 341 para. 2 KAGB)

422 Various financial market acts, such as the KWG and the KAGB, provide a legal basis for publication of notices by BaFin. § 37 para. 4 KWG and § 16 para. 8 KAGB state that if and as long as facts justify the assumption or it is established that a company is conducting banking business or providing financial services without authorisation, BaFin may provide information of this suspicion or finding, stating the company's name.

423 Sec. 391(4) of the Financial Services and Markets Act 2000 (hereinafter: FSMA 2000); for exceptions, see Sections 391(6) and (6A) of the FSMA 2000

424 FCA, Enforcement, 19 July 2022. *Under Publications/Notices and decisions,* various types of FCA warnings and decisions are published, see FCA, Publications, website

425 Section 391 Subsection 6 FSMA 2000. The Enforcement Guide describes the effective practice of the FCA in more detail; see FCA, EG 1 – FCA Handbook

426 Section 391 Subsection 6A FSMA 2000

427 Board of Governors of the Federal Reserve System, Enforcement Actions, website

428 Office of the Comptroller of the Currency, Enforcement Actions Search, website

429 Section 184 Subsection 2 of the Financial Services and Markets Act 2022 (FSMA)

430 Section 184 Subsection 2 FSMA and Section 322 Subsection 2 of the Securities and Futures Act (SFA)

431 Monetary Authority of Singapore, Investor Alert List, website

16.2.3 Assessment

FINMA is subject to strict limits under current supervisory law and case law with regard to providing specific information on its proceedings. This is particularly the case because FINMA is permitted by law only in exceptional cases to provide information on enforcement proceedings, naming the persons and entities involved. Unlike supervisory authorities in other jurisdictions, FINMA's current restrictive information practice set out by legislation does not allow it to achieve a comprehensive preventive effect by systematically showing the public where supervised persons and entities cross "red lines" according to financial market enactments.

Proactive information by FINMA (and not just in exceptional cases) requires an explicit legislative basis and the corresponding amendment of Article 22 FINMASA.[432] It should be noted in this regard that the media's need to inform the public about enforcement proceedings is usually countered by the substantial interests of the parties concerned in protecting their personality rights.[433]

This applies in particular if any confidentiality interests of the parties are not or insufficiently taken into account in the publication and the parties are named. Non-anonymised media releases can cause serious financial or reputational damage to the parties concerned. Against this background, the case law on the prevention or delay of such press releases by FINMA must also be taken into consideration.[434]

16.2.4 Possible measure

Article 22 FINMASA (Information for the general public) can be adjusted as follows:

- Introduction of a legislative principle which, in a departure from the current legal situation, obliges FINMA to provide information on completed enforcement proceedings (mandatory provision); it should be possible to derogate from this principle only in exceptional cases.
- Introduction of a legislative authorisation (optional provision) for FINMA to provide information on investigations and the opening of proceedings.

This measure has the following advantages for the financial centre and financial market supervision:

- Preventive effect: Financial institutions and senior managers are given strong incentives to prevent misconduct if they have to assume that violations of supervisory law will be made public. Accordingly, this measure promotes corporate governance and the establishment of individual accountability.
- This measure does not result in any direct costs for those affected.
- FINMA makes its activities more visible; its practice becomes more transparent and predictable.[435]
- The credibility of the financial market is strengthened by a supervisory authority that actively provides information.
- Equal treatment of the parties to the proceedings is guaranteed if FINMA systematically provides information on all enforcement decisions.

However, the following risks must be considered where FINMA provides more information to the general public:

- The publication of information on institutions and individuals can lead to possible violations of personality rights and damage to the reputation and future development of an institution.
- Publication might take place at a time when a matter has not yet been fully clarified by FINMA[436] and the parties concerned have not yet been given the opportunity to have the facts and the alleged breach of supervisory law reviewed by the courts.

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432 See also the considerations on informing the public about pending proceedings and the implications of public information for the parties concerned in BBl **2022** 776, pp. 105 f.

433 Nobel, Schweizerisches Finanzmarktrecht, Bern 2019, p. 551, para. 169

434 See the legal remedies against FINMA communication and the corresponding case law in Wyss and Zulauf, Rechtsmittel gegen die FINMA-Kommunikation, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, pp. 501 ff.

435 The increased provision of information to the general public is in line with the idea of the Freedom of Information Act (FoIA, SR 152.3), which promes transparency in the administration. FINMA is not subject to this act (Art. 2 para. 2 FoIA), as it processes a large proportion of data that is subject to the business or professional confidentiality of supervised persons and entities. See also BBl **2006** 2829, pp. 2895 f.

436 As a nearly universal rule, FINMA grants the parties concerned the right to be heard before publishing information. Publication constitutes a real act. The parties concerned who have an interest that is worthy of protection may request a (contestable) ruling on real acts in accordance with Art. 25*a* of the Administrative Procedure Act (APA)

When informing the general public about the commencement of investigations or the opening of proceedings, FINMA must ensure that the interests of those concerned are safeguarded in line with the current standard (Art. 22 para. 4 FINMASA) and that there is a public interest, i.e. a need to do so from a supervisory point of view (Art. 22 para. 2 FINMASA).

16.2.5 Conclusion

In light of the advantages listed above, increased information for the general public should be seen as positive. It has a preventive effect and creates strong incentives for financial institutions and decision-makers. It also helps to strengthen the Swiss financial market. This measure should therefore be implemented. The risks listed above must be adequately taken into account during implementation.

FINMA's current legally limited information activities are not restricted to individual sectors or systemically important financial institutions. The benefits of increased information for financial stability are likely to be felt by SIBs in particular. However, taking into account FINMA's objectives (individual and systemic protection) and equal treatment under the law, the Federal Council believes that the proposed increase in FINMA's information activities should be comprehensive for all sectors and types of financial institutions.

16.3 Pecuniary administrative sanctions

16.3.1 Background

16.3.1.1 Introduction

FINMA cannot currently impose sanctions of a penal nature such as pecuniary administrative sanctions (hereinafter also referred to simply as "administrative fines") on supervised legal entities or individuals.[437] However, it does have repressive instruments at its disposal under the FINMASA that can have a severe impact on those affected. These target individuals in particular (e.g. the prohibition from practising a profession and from performing an activity, see sections 15.3.1 and 16.4.1). Instruments with a similarly strong effect on legal entities – apart from the revocation of licences (Art. 37 FINMASA) – are not provided for in Swiss financial market law.[438]

Pursuant to various parliamentary procedural requests (e.g. Birrer-Heimo postulate[439], EATC-S postulate[440], EATC-S motion[441]) and in light of the events surrounding the takeover of Credit Suisse by UBS in spring 2023, the question arises of granting FINMA the power to impose administrative fines as one of the possible measures to expand FINMA's toolkit.[442]

A pecuniary administrative sanction is an official measure that imposes a financial burden on a party to the proceedings. This financial burden is the authority's response to a past violation of an administrative regulation. The sanction is enforced in administrative proceedings (and not in criminal proceedings).[443]

A distinction must be made between administrative fines and punishment under the criminal provisions in financial market legislation. If FINMA establishes that criminal offences may have been committed, it lodges a complaint with the competent criminal authorities. Criminal prosecutions are conducted against natural persons as a rule, and against companies only under certain circumstances.[444]

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437 Benninger and Zulauf, Verwaltungsbussen durch die FINMA?, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 466

438 See Häner expert opinion, para. 124

439 Postulate 21.4628

440 Postulate 23.3441

441 Motion 23.4336

442 FINMA, FINMA Report: Lessons Learned from the CS Crisis, 19 December 2023, p. 46

443 BBl **2022** 776, p. 12

444 See section 15.2.5.3 for a further discussion of criminal law

At international level, the Financial Action Task Force (FATF) and the International Monetary Fund (IMF) have already expressed expectations with regard to granting FINMA the power to impose administrative fines.[445]

16.3.1.2 Previous decisions not to introduce powers for FINMA to impose administrative fines

The question of whether to introduce powers for FINMA to impose administrative fines in the form of pecuniary administrative sanctions is not new. In the preparatory work for enactment of the FINMASA, a commission of experts rejected the introduction of powers for FINMA to impose administrative fines and did not include it in its proposals for a Financial Market Supervision Act in 2004. The commission of experts had come to the conclusion that – based on the practice of the European Court of Human Rights on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[446] – it appeared problematic to impose administrative fines of a certain amount in the context of administrative proceedings. In the opinion of the experts, special proceedings would have to be created in the area of financial market supervision, which they did not believe to be feasible.[447] Ultimately, the legislator refrained from introducing sanctions to that effect at the time.

In the preparatory work for revision of the Stock Exchange Act, the FDF again decided in 2013 against introducing powers for FINMA to impose administrative financial sanctions – primarily due to the adjustments to procedural law that would have been necessary.[448]

Once again in 2014, the Federal Council rejected the idea of granting FINMA the power to impose administrative fines. The reason given was that it would then be necessary to conduct two different types of proceedings, namely both administrative proceedings and administrative criminal proceedings.[449]

16.3.1.3 Report of the Federal Council on pecuniary administrative sanctions

On 23 February 2022, in response to postulate 18.4100 from the Political Institutions Committee of the National Council, the Federal Council published a comprehensive report examining how pecuniary administrative sanctions can be introduced into Swiss law and how they can be designed to comply with the Federal Constitution and the ECHR.[450] The report highlights the tension between the duty to cooperate under administrative law and the freedom from self-incrimination under criminal law.

On the one hand, a party involved in administrative proceedings is subject to a duty to cooperate, i.e. the party must actively participate in the proceedings to clarify the facts and also disclose self-incriminating information. The authorities can enforce the duty to cooperate by means of administrative and criminal coercive measures. In criminal proceedings, on the other hand, the principle applies that no one may be forced to incriminate themselves (freedom from self-incrimination/right not to cooperate, "nemo tenetur" principle).

Whether pecuniary administrative sanctions should be introduced in financial market supervisory law or other areas is not the subject of the report. The Federal Council's report does, however, show that the instrument of pecuniary administrative sanctions has become established in certain sectors, in particular in antitrust law, telecommunications law and the agricultural sector. The report also shows that legal uncertainties have emerged in practice. This is due to the different procedural principles that apply to the same facts. Pecuniary administrative sanctions are part of administrative law and are imposed in the form of contestable rulings. Despite this, due to the level of the sanctions and their repressive and penal effect, they are regularly considered a "criminal charge" within the meaning of Article 6 paragraph 1 ECHR.

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445 Benninger and Zulauf, Verwaltungsbussen durch die FINMA?, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 472, and the country assessments cited there

446 SR **0.101**

447 Zimmerli Expert Commission, Sanktionen in der Finanzmarktaufsicht, II. Teilbericht der vom Bundesrat eingesetzten Expertenkommission, August 2004

448 Benninger and Zulauf, Verwaltungsbussen durch die FINMA?, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 471

449 Die FINMA und ihre Regulierungs- und Aufsichtstätigkeit, Bericht des Bundesrates in Erfüllung der Postulate 12.4095 Graber Konrad, 12.4121 de Courten, 12.4122 Schneeberger und 13.3282 de Buman vom 18. Dezember 2014, section 2.3.3.4

450 BBl **2022** 776

Therefore, the criminal procedural guarantees of the Federal Constitution (Arts. 30 and 32 Cst.) and those of the ECHR (Arts. 6 and 7 ECHR, Art. 2 of Protocol No. 7 ECHR)[451] are applicable in principle. These guarantees provide for more extensive protection of the party than administrative law.

The report comes to the general conclusion that pecuniary administrative sanctions can be embedded in the system of general administrative law. In conjunction with the guarantees of superordinate law provided for under criminal law, the Administrative Procedure Act and the relevant substantive enactments provide a sound basis for the instrument of pecuniary administrative sanctions. Administrative practice and case law have been able to develop viable solutions based on the applicable law. The report shows that, from the perspective of constitutional law and ECHR law, it is not fundamentally impossible to introduce administrative fines to enforce administrative rules of conduct. According to case law, sanctions require that fault in the sense of culpable conduct or organisational fault is proven.

The conflict between the duty to cooperate under administrative law and the freedom from self-incrimination under criminal law has so far been resolved in practice on a case-by-case basis. The Federal Council's report outlines three different options for dealing with the conflict:

- Option 1: retention of the status quo (i.e. no legislative clarification of how to resolve the tension)
- Option 2: provisions in special legislation establishing the primacy of the duty to cooperate in the case of pre-existing relationships under administrative law or supervisory relationships
- Option 3: provisions in special legislation establishing the primacy of a right to refuse to cooperate or a prohibition on the use of evidence

Where the targets of sanctions have subordinated themselves to specific regulation and have a pre-existing relationship under administrative law or are subject to special supervision, the report indicates that it would be conceivable to establish primacy of the duty to cooperate pursuant to special legislation (option 2 above). This option would be relevant if pecuniary administrative sanctions were to be introduced in financial market law, as institutions supervised by FINMA are subject to regulation under special legislation.

The report shows that the primacy of the freedom from self-incrimination and the abrogation of the duty to cooperate (option 3 above) entail evidential difficulties and a one-sided weighting of the party's interests, as well as being time-consuming and resource-intensive. According to the report, that approach would thus be conceivable only for those areas in which the targets of sanctions are in a normal sovereign relationship with the state. This option is therefore not relevant for the introduction of pecuniary administrative sanctions in financial market law, as the supervised persons and entities are subject to regulation under special legislation.

16.3.2 International comparison[452]

16.3.2.1 Germany

In Germany, a distinction is made between criminal and administrative criminal sanctions for administrative offences, depending on the severity of the breach. German law does not recognise the term administrative sanction as such. The supervisory authority BaFin can take various preventive and repressive measures. Repressive measures in the form of sanctions are used to punish violations of financial market provisions.

In particular, BaFin is authorised to impose fines for administrative offences under the Banking Act (KWG), the Securities Trading Act (WpHG), the Insurance Supervision Act (VAG) and other special enactments. BaFin can impose fines in the form of "penalty payments" of up to EUR 2.5 million to persuade natural or legal persons to act or refrain from acting. BaFin itself does not classify the "penalty payment" as a repressive administrative measure.

16.3.2.2 United Kingdom

In the UK, both the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) are authorised to impose sanctions under financial market law. A financial sanction such as a "financial penalty" is also penal in nature. In addition, the two supervisory authorities themselves can also prosecute certain criminal offences.

[451] SR **0.101.07**

[452] Häner expert opinion, paras. 53 ff.

Throughout the enforcement proceedings, only a single public announcement is made at the end of the proceedings with a reference to the legal sanction. The reputational damage suffered in the UK as a result of enforcement proceedings is estimated to be almost nine times higher than damage from financial sanctions, and the deterrent effect of financial sanctions imposed by the FCA is also being called into question. Proposals are being made in the UK to align financial market supervisory instruments with competition law.

16.3.2.3 United States

The situation in the USA is complex due to the various supervisory authorities involved (e.g. Federal Reserve, Fed; Commodity Futures Trading Commission, CFTC; Securities and Exchange Commission, SEC).

The authorities responsible within their scope of jurisdiction can impose sanctions (civil sanctions, administrative sanctions) against violations of administrative law provisions. These sanctions include both fines of a punitive nature (civil money penalties, civil fines) and financial sanctions of a non-punitive nature (disgorgement). The imposition of criminal sanctions as such is the responsibility of law enforcement authorities such as the Department of Justice.

The Office of the Whistleblower in the USA is especially noteworthy, as it rewards information leading to successful enforcement proceedings with 10% to 30% of the total sanction amount. The supervisory authorities also have the option of concluding Deferred Prosecution Agreements (DPAs) with the companies and ending the enforcement proceedings by means of a settlement. It has been criticised that the US practice of fining companies blurs the actual purpose of criminal proceedings, namely to deter those who are actually responsible for the offence.

16.3.3 Assessment

Several previous studies have considered whether such powers for FINMA to impose administrative fines should be introduced in Swiss financial market law. Each of these studies came to a negative conclusion, for different reasons.

The Federal Council's 2022 report sets out various options for the legislator, the application of which could also be examined in the area of financial market law; in particular, it would be feasible to establish the primacy of the duty to cooperate by way of legislation in the case of pre-existing relationships under administrative law or supervisory relationships. Such a relationship exists between FINMA and the persons and entities it supervises.

Unlike other jurisdictions with major financial centres, FINMA does not have such instruments at its disposal. Individual political initiatives relating to the events at Credit Suisse and international assessments indicate that the introduction of corresponding powers for FINMA should be re-examined.

If such powers were introduced, however, it should be noted that efficient supervisory activities and the rapid restoration of compliance with the law in the event of irregularities in financial market law are a priority. So that the facts of the case can be investigated quickly and reliably, FINMA has to rely on fulfilment of the duty to cooperate (also vis-à-vis the agents it appoints). Any power of FINMA to impose pecuniary sanctions must not significantly restrict the duty of cooperation of supervised persons and entities or of persons that have a substantial participation in those persons or entities.

16.3.4 Possible measures

FINMA could be granted the power to impose pecuniary administrative sanctions on legal entities and/or natural persons.

There is also the possibility that the Federal Audit Oversight Authority (FAOA) would be able to impose pecuniary administrative sanctions on audit companies.

16.3.4.1 Power of FINMA to impose administrative fines on legal entities

This option would give FINMA the power to impose administrative fines on legal entities.

The following arguments or advantages speak in favour of this measure:[453]

- The imposition of administrative fines on legal entities would raise the awareness of the owners of the company, allowing them to refuse to discharge the management bodies from liability. In this respect, pecuniary administrative sanctions have an indirect effect on financial executives.

- The introduction of powers to impose pecuniary administrative sanctions would improve FINMA's reputation at national level. This would also strengthen trust and standing in the market as well as the reputation of financial market supervision.

- Given the global interconnectedness of the Swiss financial market, it is important how the financial market is perceived abroad. Because the instrument is well known in other jurisdictions, granting FINMA the power to impose administrative fines is likely to strengthen the reputation of supervision.

- With the power to impose administrative fines, FINMA would act as both an instructing and a sanctioning authority. FINMA has considerable expertise and professional competence in the area in question, which also ensures a uniform sanctioning practice.

Any pecuniary administrative sanctions must be designed in such a way that they have the intended effects. On the one hand, this is achieved by setting an appropriate amount, which should not threaten the existence of those affected. On the other hand, possible publication also contributes to the effect (see section 16.2).

It should also be noted that the introduction of pecuniary administrative sanctions against companies blurs the actual purpose of criminal or quasi-criminal proceedings, namely to directly punish those who are responsible for the offence.[454]

16.3.4.2 Power of FINMA to impose administrative fines on natural persons

This possible measure would give FINMA the power to impose administrative fines on natural persons.[455]

This measure has the additional potential advantage of strengthening individual responsibility by introducing pecuniary administrative sanctions against natural persons.[456] Sanctions (possibly combined with publication, see section 16.2) would be imposed on those natural persons who are ultimately responsible for breaches of supervisory law.

However, introducing administrative fines against natural persons is a complex matter, as the guarantees under constitutional and ECHR law go further for natural persons than for legal entities.[457] In particular, there is a risk that the duty to cooperate would be restricted to such an extent that the investigation of the material facts would be made more difficult.[458] This would lead to a restriction of FINMA's effectiveness.

The sanction is also likely to be offset in advance by risk premia on remuneration or by agreements on the assumption of administrative fines by the financial institution.[459]

16.3.4.3 Power of the FAOA to impose pecuniary administrative sanctions on audit firms

The FAOA is responsible for the supervision of audit companies in the areas of financial auditing and regulatory auditing. It currently has no power to impose pecuniary administrative sanctions on audit firms. Such sanctions could likewise be introduced.

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[453] On the possible advantages and disadvantages, see also Loher and Müller, Bussenkompetenz für die Eidgenössische Finanzmarktaufsicht FINMA, Iusnet Bank- und Kapitalmarktrecht, 2023

[454] Hofstetter, Unternehmen als "Prügelknaben" des Wirtschaftsrechts? in: Tatsachen – Verfahren - Vollstreckung, Zurich 2015, p. 335

[455] Any power of FINMA to impose administrative fines would have to be distinguished from the existing sanction options under the various criminal provisions of financial market law. Responsibility for prosecution in this area lies with the FDF (Art. 50 FINMASA)

[456] See also the objectives of Postulate 21.3893, also against the backdrop of the international trend to no longer focus only on companies, but increasingly also on their decision-makers; see Emmenegger, Das UK Senior Managers and Certification Regime, AJP 2022, p. 830

[457] Häner expert opinion, paras 87 f.

[458] Häner expert opinion, para. 126

[459] Häner expert opinion, para. 126

16.3.5 Conclusion

Taking the above assessment into account, granting FINMA the power to impose pecuniary administrative sanctions on legal entities should be examined. This instrument could be used to sanction violations of supervisory law at the level of the institution.[460] Even though this measure is not at the heart of strengthening the TBTF regime, it closes a gap in FINMA's toolkit compared to other countries, and it strengthens supervision in general. FINMA's current supervisory instruments are applicable to all supervised persons and entities.[461] It is difficult to justify, especially on grounds of legal equality, the introduction of administrative fines only for SIBs while this sanction instrument is not available for similar violations of supervisory law by non-systemically important financial institutions. In this light, administrative fines against legal entities should, if introduced, apply for all supervised financial institutions.

Further work should examine in detail what impact any new FINMA powers would have on the duty to cooperate and, accordingly, on the effectiveness and efficiency of FINMA's supervisory activities. In particular, it appears imperative that any legislative solution must ensure the duty to cooperate, so that FINMA's priority objective of restoring compliance with the law by a supervised person or entity is not inhibited.

Finally, further work should also include a development of the key features of any pecuniary administrative sanctions regime. This would involve the development of the legal basis, including definition of the obligations subject to sanctions, the group of those subject to sanctions, the legal consequences (e.g. level of sanction) and prescription periods.[462]

In contrast, administrative fines by FINMA against individuals are not recommended for implementation at this time. Priority should be given to the examination of administrative fines against legal entities. Administrative fines against individuals entail the risk that they would interfere with supervisory investigations in the context of enforcement proceedings and would weaken the effectiveness of supervision accordingly. FINMA already has sanction instruments at its disposal that have a drastic effect on individuals in the form of prohibitions from practising a profession and from performing an activity, the withdrawal of recognition for guarantees of proper business conduct, and the confiscation of unlawfully acquired profits.

To ensure the consistency of supervisory instruments, it should also be examined whether the FAOA should likewise have the power to impose pecuniary administrative sanctions against legal entities (audit firms).

16.4 Further instruments for establishing the accountability of institutions and individuals

The possible measures relating to the FINMA instruments discussed below may be suitable for enabling FINMA to hold institutions and individuals more easily accountable in the event of misconduct. These measures may also have a preventive effect and provide incentives for institutions and individuals to strengthen corporate governance and avoid misconduct.

16.4.1 Prohibition from practising a profession (industry ban)

16.4.1.1 Background

In the event of a serious violation of supervisory provisions, FINMA may prohibit the person responsible from practising their profession in accordance with Article 33 FINMASA and prohibit them from acting in a management capacity at any entity subject to its supervision for a period of up to five years. The prohibition from practising a profession breaks through the "concept of institutional supervision" that characterises the financial market.[463] This means that not the institution as such, but rather a specific natural person, is held accountable. This requires that the person concerned has causally and culpably caused the serious violation of supervisory law through their individual conduct, which must be proven.[464]

460 Häner expert opinion, para. 124

461 See, especially, Arts. 29 ff. FINMASA

462 BBl **2022 776**, pp. 15 f., section 4

463 Gottini and von der Crone, Berufsverbot nach Art. 33 FINMAG, SZW 6/2016, p. 643

464 Kuhn, Berufsverbot, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 377

Provision in force since 1 January 2009 and current practice

The prohibition from practising a profession (Art. 33 FINMASA) was introduced into Swiss supervisory law on 1 January 2009. From 2009 to 2022, FINMA issued 50 prohibitions, including 41 since 2014. The prohibitions were mainly issued in the areas of market integrity and combating money laundering.[465]

Prerequisites for imposing a prohibition from practising a profession

Enforcement proceedings against institutions often precede proceedings against natural persons to prohibit them from practising a profession, given that the supervisory duties are incumbent on the institutions as such.[466] The imposition of a prohibition on a natural person from practising a profession requires a serious violation of supervisory law, reflecting the principle of proportionality.[467]

The serious violation of supervisory law required by law must have been causally and culpably caused by a specific responsible person. Because the prohibition from practising a profession is considered to be a drastic measure, the requirements relating to the specificity of the violated norm and to the justification for the prohibition are high. According to current case law, the violation of instructions internal to the institution is not sufficient for the imposition of a prohibition from practising the profession if this sanction is not foreseeable for the person concerned.[468]

Moreover, the breach of duty must be individually attributable to the person concerned. Against this backdrop, and especially in the case of joint decisions by corporate bodies, it is important to determine the knowledge and level of information of the individual members of the management body, in order to be able to impose a prohibition from practising a profession.[469]

On 30 March 2023, the Federal Supreme Court held: "Individual imputability in an organisation based on the division of labour means that the serious violation of supervisory provisions must have occurred within the scope of responsibility of a specific person, where three accusations must apply cumulatively or alternatively in a legally sufficient manner for a supervisory measure: 1) an active violation of supervisory law, 2) knowledge of the violation of supervisory law and failure to take action against it in breach of duty or 3) ignorance of the violation of supervisory law in breach of duty. It should not be possible to circumvent the sanction of prohibition from practising a profession by referring to the internal division of responsibilities."[470]

Legal maximum duration of five years

The duration of the prohibition from practising a profession depends heavily on the individual case. Under current law, the prohibition is limited to a maximum of five years. In principle, FINMA takes into account both the extent of the violation of the law and the potential risk to investors and insured persons.[471] The imposition of a prohibition from practising a profession under Article 33 FINMASA constitutes a measure that significantly restricts the economic freedom of the person concerned.[472] Proportionality must therefore be taken into account when determining the duration of the prohibition.[473]

This provision complements the "guarantee requirement". In contrast to the guarantee requirement, the prohibition from practising a profession 1) is limited by law to a maximum of five years, 2) includes not only persons subject to the guarantee requirement but also in general persons who are responsible in a hierarchically leading position and 3) can also be imposed on persons who have left the company.[474]

465 Kuhn, Berufsverbot, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, pp. 374 and 377

466 Kuhn, Berufsverbot, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 375

467 Gottini and von der Crone, Berufsverbot nach Art. 33 FINMAG, SZW 6/2016, p. 642

468 FAC B-1576/2019 E. 9.4

469 Strasser, Aufsichts- und Verwaltungsstrafrechtliche Verantwortlichkeit bei Gremienentscheidungen in der Geldwäschereibekämpfung von Banken, SJZ 118/2022, p. 694

470 FSC 2C_747/2021, E. 13.2

471 Kuhn, Berufsverbot, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 373

472 FAC B-4750/2019, E.6

473 Art. 27 Cst.

474 Kuhn, Berufsverbot, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 370

Comparison with prohibition from performing an activity under Article 33a FINMASA

FINMA may impose a prohibition from performing an activity under Article 33*a* FINMASA on persons who trade in financial instruments or on a client adviser if they seriously violate supervisory law or in-house directives. The latter point is in contrast to the prohibition from practising a profession, for which the only prerequisite is a serious violation of supervisory law.

Furthermore, the prohibition from practising a profession differs from the prohibition from performing an activity in terms of the duration of the prohibition. A prohibition from practising a profession can be imposed for a period of up to five years (Art. 33 para. 1 FINMASA), while FINMA must specify a fixed period for a prohibition from performing an activity, but can impose it indefinitely in the case of repeat offences (Art. 33*a* para. FINMASA).

The imposition of a prohibition from practising a profession does not preclude the simultaneous imposition of a prohibition from performing an activity. The two prohibitions can accordingly be combined and can also be imposed for different lengths of time. The legal consequences of the prohibition from performing an activity for traders and client advisers go further than the prohibition from practising a profession in that the prohibition from performing an activity provides for a prohibition on any activity in trading in financial instruments or as a client adviser, and not only for management positions. Compared to the prohibition from practising a profession, the prohibition from performing an activity is narrower in that only certain employees (traders or client advisers according to the FinSA) may be subject to such a prohibition.[475]

16.4.1.2 International comparison

United Kingdom

Prohibitions from practising a profession are called "prohibition orders" in the UK and are centrally regulated for all financial sectors in the Financial Services and Markets Act (FSMA).[476] The FCA is empowered to impose prohibition orders. If the person concerned is not fit or proper to carry on a regulated activity, the FCA may impose a prohibition from practising a profession. The scope of a prohibition will depend on the duties of the person concerned in connection with the activities covered by supervisory law, the reasons why they are not fit and proper and the risk of consumer detriment. In principle, the prohibition order can be issued for an unlimited period. However, the FCA also has the option of specifying in a final notice after how many years a prohibition order can be lifted.[477]

Germany

BaFin can issue prohibitions on the exercise of an activity based on § 36 or 36*a* of the Banking Act (KWG).[478] By issuing such a prohibition, a managing director or a member of the administrative or supervisory body of institutions or companies in the legal form of a legal entity is prohibited from exercising the activity for an indefinite period of time.[479] Persons who were not managing directors at the time of the violation will be prohibited from performing an activity for up to two years, or indefinitely in the case of repeat offences.

Singapore

In Singapore, prohibition orders are regulated by sector,[480] the banking sector not being covered.[481] The provisions on prohibitions from practising a profession are currently being fundamentally revised. In particular, the scope of application is to be expanded and the legislative basis harmonised.[482] Under current law, the Monetary Authority of Singapore (MAS) can issue unlimited or limited prohibitions from practising a profession, depending on the severity and nature of the violation.

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475 Kuhn, Tätigkeitsverbot, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, pp. 383 f

476 UK, Financial Services and Markets Act 2000, Section 56

477 FCA, FCA Enforcement Guide, section 9.2.4

478 Art. 36 KWG and Art. 36a KWG

479 See also for persons who were not managing directors at the time of the violation, Art. 36a KWG

480 Specifically in Arts. 101A et seq. of the Securities and Futures Act (SFA); in Arts. 68 et seq. of the Financial Advisers Act (FAA); and in Arts. 57 et seq. of the Insurance Act (IA)

481 However, a bank employee may be prohibited from practising a profession where the activity is covered by other financial market enactments

482 Monetary Authority of Singapore, Explanatory Brief for Financial Services and Markets Bill 2022, 14 February 2022

16.4.1.3 Assessment
Issuing a prohibition from practising a profession is a concrete option available to FINMA for taking action against an individual. The prohibition from practising a profession and the prohibition from performing an activity differ in terms of the prerequisites and duration. Aligning the prohibition from practising a profession with the prohibition from performing an activity would make it easier for FINMA to take action against natural persons as needed and, in the case of repeat offences, to permanently prohibit them from practising their profession.

16.4.1.4 Possible measures
Analogously to the prohibition from performing an activity under Article 33a FINMASA, FINMA should also be able to use the instrument of prohibition from practising a profession in the event of serious violations of in-house directives. This can increase the importance of in-house directives, which would be in the interest of good corporate governance. In this way, FINMA can hold individuals to greater account. Individuals must then understand, however, that a serious violation of in-house directives can also lead to a prohibition from practising a profession.

A serious violation of in-house directives must ultimately be deemed likely to bring about a serious violation of supervisory law. It should be borne in mind that the prohibition from practising a profession, even as already designed under current law, constitutes a severe restriction of the constitutionally guaranteed economic freedom of the person concerned.

In addition, the maximum duration of five years for the prohibition from practising a profession should, in line with the prohibition from performing an activity, be for a fixed period and, in the case of repeat offences, it should likewise be possible to impose a permanent prohibition.

16.4.2 Confiscation

16.4.2.1 Background
The purpose of confiscation (disgorgement) under Article 35 FINMASA is to confiscate a profit (paragraph 1) or a prevented loss (paragraph 2) from a supervised person or entity or from a responsible person in a management position. Confiscation serves to restore compliance with the law and not a punitive or repressive purpose.[483]

Article 35 FINMASA applies only to natural persons in a management position. This means that an employee of a supervised entity without a management function who has unlawfully made a personal profit or prevented a personal loss through a serious violation of supervisory law is not subject to this provision. However, Article 145 FinMIA contains a reference provision that enables FINMA to confiscate profits from all persons who have exploited insider information (Art. 142 FinMIA) or committed market manipulation (Art. 143 FinMIA), among other offences.

16.4.2.2 International comparison
Confiscation is a common enforcement instrument in other jurisdictions as well. In the UK, the PRA and FCA regularly order disgorgement where a financial institution or individual has benefited from a violation of supervisory law.[484] In the USA, disgorgement is part of the SEC's standard toolkit.[485]

16.4.2.3 Assessment
The personal scope of application of confiscation in relation to natural persons differs from that of the prohibition from practising a profession or the prohibition from performing an activity, both of which target natural persons directly. In the case of the prohibition from performing an activity, a management position is not a prerequisite, and in the case of persons subject to a prohibition from practising a profession, a management position may regularly be the case, but is not a mandatory prerequisite.[486] The instrument of confiscation in relation to natural persons is therefore inconsistent with the prohibition from performing an activity, as the group of those subject to that prohibition also includes persons who are not in a management position.

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[483] Bösch on Art. 35 FINMASA in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd ed., Basel 2019, para. 7

[484] Bank of England – PRA, The Bank of England's approach to enforcement: statements of policy and procedure, January 2024; FCA, FCA Handbook - DEPP 6.5 Determining the appropriate level of financial penalty

[485] See, for example, SEC press release: SEC Announces Enforcement Results for Fiscal Year 2023, 14 November 2023

[486] See Uhlmann, Berufsverbot nach Art. 33 FINMAG, in: SZW 5/2011, p. 437, or Gottini and von der Crone, Berufsverbot nach Art. 33 FINMAG, SZW 6/2016, p. 645

16.4.2.4 Possible measures
The scope of application of Article 35 FINMASA could be extended to all natural persons. The extension would then also cover, for example, client advisers and traders to whom the prohibition from performing an activity under Article 33*a* FINMASA could apply and who are not in a management position. The provision would expand FINMA's existing toolkit for enforcing financial market law and would be in line with the existing legal provisions in the FinMIA with regard to personal scope of application.

16.4.3 Fit and proper assessment

16.4.3.1 Background
One of the prerequisites for FINMA to grant a bank a licence is that the persons entrusted with the bank's administration and management enjoy a good reputation and thereby guarantee irreproachable business conduct (see Art. 3 para. 2 let. c BankA).[487]

According to FINMA's supervisory practice, which is supported by the Federal Supreme Court, the guarantee requirement applies not only to individual persons but also to the bank as a whole. FINMA examines the personal guarantee requirement in particular as part of the initial authorisation process, in the event of changes to management bodies (vacancies or the creation of new positions) and in response to specific indications (e.g. as part of prudential supervision).

When carrying out a fit and proper assessment of a person, FINMA may withdraw recognition of the guarantee from a member of a management body of or a qualified investor in a supervised institution. If a person is already in office or has a qualifying participation and the guarantee requirement is no longer met, FINMA may withdraw recognition of the guarantee from the person concerned. For this purpose, it instructs the institution by means of a ruling to remove the person subject to the guarantee requirement from their guarantee function or holding.

Under the guarantee requirement, function holders are obliged to meet certain moral requirements (propriety or properness), i.e. they must behave correctly and honestly and enjoy a good reputation. They must also have the necessary professional qualifications (fitness) for a specific function. The criteria applied by FINMA in its fit and proper assessment are not set out in detail in the regulations. FINMA has explained the guarantee requirements for banks in guidance on changes to management bodies. The guidance includes an explanation of the assessments carried out by FINMA with regard to the properness and fitness of candidates.

According to FINMA practice, a change in a bank's management bodies is considered a change of material significance in accordance with Article 8a paragraph 2 BankO. The authorisation requirement for changes to bank management bodies is therefore based on a regulation that is merely implied at the legislative level and is made explicit at the ordinance level.

The preventive ex ante application of this instrument can have the effect that persons unsuitable for a position do not even get as far as being appointed to a body in which they bear responsibility for corporate governance and where, for example, they would have to ensure that mechanisms are implemented to prevent individual misconduct in their area of responsibility at all hierarchical levels. The ex ante fit and proper assessment thus establishes a link to individual responsibility for the persons concerned as early as the nomination stage.[488] The properness and fitness of a person subject to the guarantee requirement is therefore also a prerequisite for appropriate corporate governance.

The responsibility for selecting the persons lies with the institution in question. The institution has primary responsibility for assessing fitness and properness. However, an increased influence of the supervisory authority on the appointment of persons subject to the guarantee requirement is to be expected if the criteria are set out in more detail.[489]

[487] Kuhn and Wyss, Vorsorgliche Massnahmen und Schutzmassnahmen, in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, pp. 365 f.

[488] Reiser, Missmanagement im Bankensektor und die FINMA-Gewährsprüfung, in: SZW 6/2022, p. 544

[489] Bischof, Die Gewähr für eine einwandfreie Geschäftstätigkeit – Eine Betrachtung des schweizerischen Finanzmarktrechts im Lichte internationaler Standards und des Rechts der Europäischen Union, Zurich 2016, para. 810

16.4.3.2 International comparison
In other jurisdictions (e.g. the UK, the EU and Hong Kong), the fit and proper requirements are defined in regulatory provisions, which significantly increases the legal certainty for measures by the supervisory authority and provides institutions and persons subject to the guarantee requirement with a framework for the applicable criteria.[490] In the UK and Hong Kong, the requirements are related to the respective senior managers regime (the Senior Managers and Certification Regime in the UK and the Managers in Charge Regime in Hong Kong).

According to the "Guidelines on the assessment of the suitability of members of the management body and key function holders"[491] of the European Banking Authority (EBA) in force since 30 June 2018, institutions must assess the individual and collective suitability of the members of the management body on an ongoing basis. In the EU, these requirements are not related to a senior managers regime.

16.4.3.3 Assessment
The guarantee requirement under the financial market laws and the fit and proper assessment by FINMA are key instruments of financial market supervision that are extremely effective when used consistently. There is therefore no fundamental need for action at the legislative level, but selective improvements at the banks can be considered.

16.Possible measures
The possible introduction of a senior managers regime involves applying the fit and proper assessment to the group of persons covered by the regime (see section 15.3.4.3).

In the case of banks, the legal basis for the prior approval of changes to management bodies can be strengthened. The principle that currently applies under Article 8*a* BankO on how to proceed in the event of changes to facts (duty to give notice and obtain authorisation) must be made explicit at the legislative level. The Federal Council can specify the changes requiring notice and authorisation in the same way as the Financial Institutions Ordinance of 6 November 2019.[492] This approach increases legal certainty for FINMA and leads to a harmonisation
of the hierarchy of norms in the various regulated sectors of the financial market.

In contrast to insurance companies, financial institutions under the FinIA and licensees under the Collective Investment Schemes Act of 23 June 2006[493], the institutional guarantee requirement is not explicitly set out in the Banking Act. This requirement should be included in the Banking Act and, if necessary, more detail should be provided at ordinance level by the Federal Council.

16.4.4 Duty to provide information and to report

16.4.4.1 Background
Financial market players have far-reaching duties of cooperation vis-à-vis FINMA. In accordance with Article 29 paragraph 1 FINMASA, supervised persons and entities, their audit companies and external auditors as well as persons or companies that are qualified[494] investors or that have a substantial participation in the supervised persons and entities must provide FINMA with all the information and documents that it requires to carry out its tasks. The legal rationale behind this fundamental provision is that FINMA can carry out its tasks in full knowledge of the facts.[495]

The duty of cooperation of supervised persons and entities takes two forms: Firstly, supervised persons and entities and their audit companies are required to collect and prepare information about their activities and submit it to FINMA (duty to provide and hand over information). Secondly, supervised persons and entities and their audit companies must immediately report to FINMA any incident that is of material substantial importance to the supervision (duty to report). The duty to provide and hand over information applies only at FINMA's request, whereas the duty to report requires supervised persons and enti-

[490] UK: FCA, Fit and Proper test for Employees and Senior Personnel sourcebook, December 2023; Bank of England, Fitness and Propriety, PRA Rulebook, 31 December 2020. Hong Kong: Securities and Futures Commission, Fit and Proper Guidelines, January 2022. EU: Press release of the EBA, EBA and ESMA publish final guidance on fit and proper requirements, 2 July 2021

[491] EBA, Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body, 31 December 2021

[492] SR **954.11**

[493] SR **951.31**

[494] Holding at least 10% of the capital, Art. 3 para. 2 let. cbis BankA and Art. 11 para. 4 FinIA

[495] Truffer on Art. 29, in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd ed., Basel 2019, para. 1; see also Jutzi and Schären, Art. 145 Aufsichtsinstrumente gemäss FINMAG, in: Sethe et al. (eds.), Kommentar zum Finanzmarktinfrastrukturgesetz FinfraG, Zurich 2017, para. 7

ties to inform FINMA proactively and without being requested to do so.[496] In principle, the duty to cooperate is interpreted rather broadly by case law, as the preventive utilisation of sufficient information is intended to facilitate the early detection of violations of the law and other irregularities.[497] The question of what information FINMA requires to carry out its tasks is therefore at FINMA's discretion.

According to the wording of Article 29 paragraph 1 FINMASA, supervised persons and entities are obliged to provide information to FINMA, but not, or not explicitly, the management bodies personally.[498] The management bodies are, however, obliged to provide information in relation to the legal entity they represent.[499] A personal duty to provide information on the part of management bodies may relate to matters that do not directly concern the legal entity, for example another professional activity of a person or proceedings brought against that person, i.e. circumstances that could potentially call into question that person's fitness and properness.[500] Under Article 29 paragraph 1 FINMASA, other employees of a supervised person or entity are not subject to any duty to provide information.

The lack of an (explicit) personal duty for management bodies and employees to provide information makes it more difficult for FINMA to conduct investigations outside proceedings.

However, persons who are not covered by Article 29 FINMASA may be required to testify and produce documents in proceedings against a supervised person or entity if it is not possible to establish the facts of the case sufficiently in any other way (Art. 14 para. 1 and Art. 17 APA).[501]

16.4.4.2 International comparison

The obligation to pass on information from the supervised persons and entities to the supervisory authorities is a fundamental principle of effective supervisory activity. Rules to this effect can accordingly also be found abroad.

In the UK, senior managers of supervised financial institutions in particular have been required since 2016 to disclose to the FCA and PRA any information of which the FCA or PRA would reasonably expect notice.[502] In addition, both authorities have set out principles according to which companies must disclose all information relevant to supervision.[503]

Institutions in Germany also have duties to report and to provide information. In certain circumstances, BaFin is provided with extensive information material about facts relevant to supervision in order to verify facts that require clarification.[504] Within Germany, BaFin is authorised to demand information from all supervised institutions, the members of their management bodies and employees on all business matters as well as the submission of books, documents and other records.

16.4.4.3 Assessment

The duties to provide information and to report according to the wording of Article 29 FINMASA apply to a limited group. FINMA depends on comprehensive information so that it can carry out its activities effectively in line with its objectives. Extending the group of those subject to these duties would enable FINMA to obtain more information more easily.

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496 Romerio et al., Information – Vermittlung, Verwertung und Verbreitung bei komplexen Verfahren, in: Romerio and Bazzani (eds.), Interne und regulatorische Untersuchungen II, EIZ – Europa Institut Zürich, vol. no. 172, Zurich 2016, p. 11

497 FSC 108 Ib 196 E 2a; FSC 126 II 111, E 3b; FSC 121 II 147, E 3a; Truffer on Art. 29, in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd ed., Basel 2019, para. 17; Macula, Mitwirkungspflichten nach Art. 29 FINMAG – zulässige Grenze strafprozessualer Selbstbelastungsfreiheit?, recht 1/2016, p. 32

498 Truffer on Art. 29, in:Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd ed., Basel 2019, para. 8

499 Truffer on Art. 29, in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd ed., Basel 2019, para. 8

500 Schönknecht, Auskunftspflicht gegenüber der FINMA, Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 73. The author is also of the opinion that the management bodies, being subject to the guarantee requirement, are subject to a personal duty to provide information, as otherwise FINMA would not be able to carry out the necessary fit and proper assessment for these persons

501 Truffer on Art. 29, in: Watter and Bahar (eds.), Basler Kommentar FINMAG/FinfraG, 3rd ed., Basel 2019, para. 6

502 For example, FCA, Code of Conduct (COCON), 2.2.4

503 Bank of England, Fundamental Rules and Principles for Businesses, January 2016

504 Arts. 44-44c of the Banking Act (KWG) in the version promulgated on 9 September 1998 (BGBl. I p. 2776), which was last amended by Art. 12 of the Act of 22 February 2023 (BGBl. 2023 I No. 51)

16.4.4.4 Possible measures

The introduction of an explicit duty for members of management bodies and other persons subject to the guarantee requirement and all employees to provide information in accordance with Article 29 paragraph 1 FINMASA (e.g. analogously to Art. 15a para. 1 of the Audit Oversight Act of 16 December 2005[505], AOA)) would make it easier for FINMA to access these persons for fit and proper assessments and investigations in the context of proceedings. A duty to provide information can be important, for example, in investigations relating to a possible prohibition from performing an activity if no proceedings are opened against an institution.

At the same time, Article 29 paragraph 2 FINMASA could be made more precise to the effect that the duty to report set out therein also explicitly refers to the personal duty of persons subject to the guarantee requirement to report.

FINMA could use this possible measure to obtain supervisory information more easily and with legal certainty, thus making it easier to hold individuals accountable.

16.4.5 Whistleblowing/right to report

16.4.5.1 Background

FINMA is legally required to intervene in the event of irregularities at supervised persons and entities. To carry out its activities, FINMA needs to have information at its disposal about supervised persons and entities that is relevant to supervisory law. For this reason, a specific provision exists on the duty to provide information and to report (Art. 29 FINMASA). Based on this duty to provide information and to report, institutions are required to provide FINMA with information including on violations of financial market law.

Of particular interest to FINMA are reports of suspected misconduct that people with an inside perspective of a supervised person or entity, i.e. primarily current or former employees, can make to FINMA (whistleblowing).[506] External whistleblowing, where the whistleblower's report is not made within the company but to an authority outside the company, raises questions under employment law[507] and criminal law.[508,509]

<u>*No general legislative norm under private law*</u>

In Switzerland, provisions for the protection of whistleblowers currently exist only under public law. At federal level, Article 22*a* of the Federal Personnel Act of 24 March 2000[510] ccontains a whistleblowing provision applicable to the Federal Administration. The provision provides for 1) an obligation to report felonies and misdemeanours, 2) a right to report other irregularities and 3) corresponding protection for whistleblowers. Likewise, most cantons have corresponding cantonal personnel ordinances that regulate how to deal with irregularities within cantonal administrations. Despite these legal provisions, "going public" is still associated with great risks for the whistleblowers covered by these rules.[511]

Under private law, there are currently no rules on how an employee must proceed in the event of irregularities in the workplace and what they may or must do if they discover irregularities in the workplace.[512] There are no provisions for the protection of whistleblowers in the Code of Obligations. The Federal Council submitted a bill to Parliament for the partial revision of the Code of Obligations entitled "Protection in the event of reporting irregularities in the workplace".[513] This bill would have allowed an employee to disclose information to an authority or the public without breaching their duties, provided certain conditions were met. After lengthy deliberations in 2020, the bill did not find a majority in Parliament for various reasons. For some members, the bill offered too little protection against dismissal, while others described it as "too complicated, too bureaucratic and not practical enough".[514]

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[505] SR **221.302**

[506] Schönknecht, Meldungen von Hinweisgebern ("Whistleblowing"), in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 86

[507] Violation of duty of loyalty and confidentiality as referred to in Art. 321a paras 1 and 4 CO

[508] For example, Art. 47 BankA, Art. 147 FinMIA and Art. 69 FinIA

[509] Schönknecht, Meldungen von Hinweisgebern ("Whistleblowing"), in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 86

[510] SR **172.220.1**

[511] Hafner and Reimann, Die Meldung von Missständen (Whistleblowing) im öffentlichen Dienstrecht, Theorie und Praxis des Unternehmensrechts, Festschrift zu Ehren von Lukas Handschin, Zurich 2020, pp. 293 ff.

[512] Götz Stähelin, Unternehmensinterne Untersuchungen, Zurich 2019, p. 15

[513] BBl **2013** 9513; and BBl **2019** 1409

[514] Official Gazette 2020 N, pp. 135 ff.

The lack of protection for whistleblowers in the private sector is the subject of a motion by Councillor of States Noser, which was adopted by the Council of States on 27 September 2023.[515]

However, the National Council rejected the motion on 27 February 2024, on the basis that there was no prospect of a compromise solution being achieved. In September 2023, the Federal Council itself had recommended that the motion be rejected, despite agreeing in principle with the motion as regards the need for action. The grounds for the Federal Council's rejection were that Parliament had already rejected the government's proposals twice in the past two years, and that the Noser motion did not contain any new parameters on which to base a bill likely to achieve a majority.[516]

Criminal law implications for companies
Since 2003, Swiss criminal law has included a provision on the criminal liability of legal entities.[517] It is accordingly permissible under Swiss law to punish legal entities, even though natural persons are always behind an offence. This means that in addition to the provisions of the Code of Obligations on the establishment of an appropriate compliance organisation, a minimum level of compliance organisation is also entailed by corporate liability under criminal law. A company is accordingly already obliged under criminal law to take organisational measures to prevent the predicate offences mentioned in the relevant criminal article.[518]

The Office of the Attorney General of Switzerland and the courts place various requirements on a compliance system to ensure that it is sufficient from a criminal law perspective. In addition to other measures, this regularly includes the implementation of an internal whistleblowing system. Especially in the area of corruption and money laundering, the implementation of such a system is essential in order to avoid criminal liability.[519]

Establishment of whistleblower systems as best practice
Even without the correspondin basis in the Swiss Code of Obligations, whistleblower systems are now considered important for a company's compliance management system (CMS) in line with best practice.[520]

If a company introduces a whistleblower system, this shows that the company promotes a speak-up culture within the company and takes that culture seriously.[521]

"Trickle-down" principle of case law from the Federal Supreme Court
Given the lack of an explicit legislative basis in private law, the case law of the Federal Supreme Court has become authoritative, based on the "trickle-down" principle. This case law is supplemented by the detailed whistleblowing case law of the European Court of Human Rights. If a whistleblower draws attention to possible irregularities, this can raise numerous issues under employment and criminal law.

In terms of employment law, possible breaches of the employee's duty of loyalty and confidentiality must be considered (Art. 321*a* CO). In addition, whistleblowers are at risk of disclosing secrets if there is no explicit justification or reason for exclusion from punishment.[522]

The Federal Supreme Court requires that whistleblowers must first raise irregularities internally. Only if they are unsuccessful in doing so may a whistleblower approach the competent external authority, and if the latter does not take action within a reasonable period of time the whistleblower may turn to the media or the public. The public or private interests in question must take precedence over the interest in keeping the irregularity secret. The legal situation and the possible protection of the whistleblower in the event of indications of possible irregularities is highly dependent on the individual case and difficult to assess in advance.[523]

[515] Motion 23.3844

[516] See National Council press release: Nationalrat stimmt gegen neue Whistleblower-Vorlage, 27 February 2024

[517] Art. 102 SCC

[518] Sethe and Andreotti, Verantwortlichkeit im Unternehmensrecht VIII, EIZ – Europa Institut Zürich Vol./No. 171, Zurich/Basel/Geneva 2016, pp. 107 f.

[519] Nadelhofer and El-Hakim, Compliance im Zentrum des Unternehmensstrafrechts, Recht relevant. für Compliance Officers 5/2022, pp. 13 f.

[520] Pikó et al. (eds.), Corporate Compliance Handbuch, Basel 2022, § 45 para. 3; see also Economiesuisse, Swiss Code of Best Practice of Corporate Governance, 6 February 2023, point 12 second lemma

[521] On the success factors for whistleblowing systems and the importance of speak-up culture, see Pikó et al. (eds.), Corporate Compliance Handbuch, Basel 2022, §45 Hinweisgebung, paras 129 et seq.

[522] For example, Arts. 162, 320 and 321 SCC; Art. 47 BankA; Art. 69 FinIA; Art. 147 FinMIA; Art. 6 UCA; see Lehmkuhl, Wirtschaftsstrafrecht der Schweiz, 2nd ed, Bern 2021, §5 para. 7

[523] Lehmkuhl, Wirtschaftsstrafrecht der Schweiz, 2nd ed., Bern 2021, p. 171, para. 7b and the case law cited therein

Demarcation of the right to report from the duty to provide information and to report for financial market players

The duty of financial institutions to provide information and to report to FINMA is one of FINMA's central supervisory instruments. Because FINMA, unlike law enforcement authorities, does not have the power to take coercive measures, it may not seize data or documents to investigate the relevant facts. Instead, supervised persons and entities and their audit companies have a duty to cooperate under administrative law so that FINMA immediately becomes aware of any incidents relevant to supervision.[524]

The right to report must be distinguished from the duty to report pursuant to financial market law under the FINMASA. What is of interest here is how FINMA or other authorities deal with voluntary reports from third parties regarding suspected irregularities at financial institutions.

FINMA's current practice in dealing with whistleblowers

FINMA takes a cautious approach in dealing with whistleblowers, given that no explicit legislative basis exists. A more active approach by FINMA would be desirable in certain constellations, especially when it comes to an irregularity that would have to be brought to FINMA's attention under the duty to report pursuant to financial market law.[525]

FINMA has a whistleblowing platform that allows whistleblowers to make a report either as a client or as a "person with an inside perspective of an institution".[526] FINMA receives both anonymous tips and tips from whistleblowers who disclose their identity.[527]

It is also worth noting that in a provision entitled "Duty to report, reporting system and right to report" created especially for that purpose, the Therapeutic Products Act of 15 December 2000[528] (TPA) stipulates that any violations of the law may be reported to Swissmedic.529 In this way, the law itself creates a justification under criminal law within the meaning of Article 14 SCC and thus an exception to the employee's duty of confidentiality.[530]

16.4.5.2 International comparison

Various supranational and international organisations have provisions for whistleblowers. The OECD and the G20, for example, give high priority to the protection of whistleblowers on the global anti-corruption agenda.

The OECD has issued various guidelines on the subject,[531] and the Council of Europe also makes specific recommendations on how whistleblowers should be protected.[532]

The EU's Whistleblowing Directive (EU) 2019/1937[533] similarly aims to protect people who report breaches of Union law.[534] By the end of November 2023, the directive had been implemented by 25 out of 27 member states. In Germany, the directive is implemented in the Whistleblower Protection Act of 31 May 2023, which prohibits reprisals and retaliatory measures against whistleblowers. It gives primacy to reporting over confidentiality obligations. The whistleblower has the right to choose between internal and external reporting. BaFin is explicitly listed as an external reporting office of the German federal government.

In the USA, both the Sarbanes-Oxley Act and the Dodd-Frank Act contain corresponding provisions for the protection of whistleblowers. According to the latter, whistleblowers are awarded between 10% and 30% of the

524 See Art. 29 para. 2 FINMASA und section 16.4.4

525 Schönknecht, Meldungen von Hinweisgebern ("Whistleblowing"), in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 90

526 FINMA, Making a report, website

527 Schönknecht, Meldungen von Hinweisgebern ("Whistleblowing"), in: Zulauf and Wyss (eds.), Finanzmarktenforcement, Bern 2022, p. 86

528 SR **812.21**

529 Art. 59 para. 7 TPA

530 BBl **2013** 1, p. 89

531 OECD, Whistleblower protection, website

532 Council of Europe, Protecting Whistleblowers, Recommendation CM/Rec(2014)7; see Pikó et. al., Corporate Compliance Handbuch, §45 para. 2, including links to the relevant sources

533 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26 November 2017, p. 17

534 Pikó et al. (eds.), Corporate Compliance Handbuch, Basel 2022, §45 para. 3

official proceeds where the accusation leads to a conviction of the company and the fines amount to more than USD 1 million.[535]

16.4.5.3 Assessment

The media regularly report on actual or alleged irregularities in financial institutions or other companies. With their reports, whistleblowers can play a key role in exposing such irregularities.

In addition, courts regularly have to deal with legal issues relating to labour, data protection and criminal law when there are indications of irregularities. This situation creates legal uncertainty for both potential whistleblowers and FINMA, which should be eliminated.

In March 2020, Parliament definitively rejected the revised bill on a partial revision of the CO with protection provisions for whistleblowing in the workplace. There is thus still no legislative protection for whistleblowers in Switzerland. The lack of general rule does not, in principle, preclude special legal provisions for the financial markets which would make it easier for FINMA to uncover misconduct by institutions and individuals. As the renewed rejection of the Noser motion (23.3844) by the National Council shows, there is still no prospect of a compromise solution being achieved by Parliament.

16.4.5.4 Possible measures

As a possible measure, a provision can be introduced in financial market law that establishes a right to report by improving the protection of whistleblowers (analogous to Art. 59 para. 7 TPA). This would enable FINMA to obtain more information that can lead to evidence of misconduct (by institutions and individuals).

In the case of implementation in financial market law alone, the interfaces with private and criminal law would have to be examined.

It should also be examined to what extent the speak-up culture within an institution can be promoted, for example through the introduction of internal reporting systems. A useful approach here would be the establishment of rules in connection with the corporate governance requirements that would oblige supervised persons and entities to maintain an internal reporting system and to encourage employees to make use of that system.

16.4.6 Conclusion

The following measures should be implemented because they would strengthen the important enforcement capacity and effectiveness of supervision as well as the ability to influence corporate governance, would have a predominantly positive cost/benefit ratio and would not require any further comprehensive clarification:

- Alignment of the prohibition from practising a profession with the prohibition from performing an activity (section 16.4.1.4): This alignment makes it easier for FINMA to take action against natural persons and remove them from the market in the event of serious repeat violations.

- Adjustment of confiscation, applying it not only to persons in management positions (section 16.4.2.4: FINMA should also be able to enforce confiscation against persons who are not in a management position but who have committed a serious violation.

- Adjustments to the fit and proper assessment for banks (section 16.4.3.4): The two possible measures make adjustments for banks that have already been introduced in other sectors and support FINMA's supervisory activities.

- Expansion of the duty to provide information and to report (see section 16.4.4.4): This facilitates the flow of information to FINMA and supports FINMA in achieving its objectives.

Because these adjustments affect fundamental supervisory instruments, and because unequal treatment in such cases would be difficult to justify, it appears appropriate to implement these measures for all financial institutions (with the exception of the adjustment to the fit and proper assessment, which is specific to banks).

The assessment reveals a need for action on the lack of protection for whistleblowers. However, the renewed rejection of the Noser motion shows that there is still no prospect of a compromise solution being achieved by Parliament, and for this reason the implementation of a corresponding measure in financial market legislation only is not recommended.

[535] Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, Zurich/St. Gallen 2021, p. 27

16.5 Use of audit companies

16.5.1 Background

16.5.1.1 Definition of the problem

FINMA must audit compliance with the provisions of supervisory law by the persons and entities it supervises (Arts. 24 et seq. FINMASA). The individual financial market acts determine whether FINMA can carry out these regulatory audits itself or arranges for them to be carried out by audit companies. Under the financial market acts, FINMA uses audit companies as an "extended arm of FINMA"[536] for the audit. This model of supervision is known as the "dual supervision system".

Supervised persons and entities are regularly required by law to engage and pay an audit company to carry out a regulatory audit (see, e.g., Art. 18 para. 1 BankA). This arrangement is sometimes criticised. For example, in its last assessment of the Swiss financial sector as part of the Financial Sector Assessment Program (FSAP), the IMF recommended that the audit companies should be engaged and paid by FINMA instead of the banks, in order to further reduce potential conflicts of interest.[537] In a postulate, Councillor of States Z'graggen has requested a report from the Federal Council on how the independence of external auditors at TBTF banks can be strengthened.[538]

16.5.1.2 Economic dependencies and potential associated problems

There are usually multi-layered economic linkages between the supervised persons and entities and the firms they commission to carry out audit activities. A distinction must be made between the regulatory audit and the financial audit in accordance with the Code of Obligations. The regulatory audit is carried out separately from the financial audit (see Art. 5 para. 4 of the Financial Market Auditing Ordinance of 5 November 2014,[539] FMAO-FINMA). In the vast majority of cases, the supervised persons and entities appoint the same firm as the external auditor responsible for the financial audit and as the regulatory audit company in order to benefit from synergies. In addition, the supervised persons and entities award the firms advisory engagements (e.g. legal and tax advice). This can lead to economic entanglements and dependencies between supervised persons and entities and the firms they commission to perform audit and advisory activities, which can impair the objectivity of regulatory audit activities. In particular, there is a risk that, with regard to existing or future engagements, the audit company may not address supervisory problems of their client with the necessary clarity, and may not present those problems to the client and the supervisor. Similarly, supervised persons and entities may be tempted to select audit companies that might interpret the existing rules more broadly and in a manner more amenable to the supervised person or entity than other audit companies would. Both risks can lead to problems for the supervisor, as relevant information may not reach the supervisor in time and supervisory measures may therefore only be initiated late or not at all.

16.5.1.3 Control mechanisms

To prevent these inherent conflicts of interest, various control mechanisms have been established in legislation, ordinances and FINMA's supervisory practice. The Federal Audit Oversight Authority (FAOA) licenses and supervises persons and entities that provide audit services.[540] FINMA and the FAOA may exchange information for the purpose of enforcing the legislation within their scope of responsibilities.[541] For example, FINMA can report to the FAOA if an auditor has not conducted the regulatory audit in accordance with the applicable standards. In extreme cases, the FAOA can withdraw the auditor's licence as a result.

Under Article 11*l* of the Audit Oversight Ordinance of 22 August 2007,[542] extensive independence requirements apply to the audit companies.[543] Given that advisory services can impair an objective regulatory audit, audit companies may not perform certain activities in addition to

[536] FINMA, Circular 2013/3 Auditing, para. 1

[537] IMF, Switzerland Financial System Stability Assessment, IMF Country Report No. 19/183, June 2019

[538] Postulate 23.3450

[539] SR **956.161**

[540] The basis is found in the AOA. Audit oversight was strengthened with the bill to bundle oversight authority over audit firms and audit companies at the FAOA (came into force on 1 January 2015)

[541] Art. 22 AOA, Art. 28 para. 2 FINMASA

[542] SR **221.302.3**

[543] This provision includes a reference to Art. 728 CO, which lists requirements on the independence of external auditors

the regulatory audit.[544] Of special note here is the prohibition of self-auditing (Art. 728 para. 2 No 4 CO), which ensures that an audit company does not audit its own work. The lead auditor for the financial audit or the lead auditor for the regulatory audit must relinquish the financial audit engagement after seven years and may only resume it three years later.[545] The audit firm may not earn more than 10% of its total fees (from auditing and other services) from one client (at individual company and group level).[546]

FINMA has so far set out the practice for conducting audits in a circular. According to this document, FINMA defines the audit strategy (i.e. the areas to be audited) for institutions in supervisory categories 1 and 2 (for banks, these include the systemically important banks). For supervised persons and entities in categories 3 to 5 (including non-systemically important banks), standard audit strategies are applied, which are ultimately also determined by FINMA and which FINMA can adapt for specific institutions if necessary.[547] This means that the audit companies must carry out the audit activities in accordance with FINMA's requirements. They also submit the audit report to FINMA.

Under the individual financial market acts, FINMA has the option of carrying out in-depth investigations itself in certain audit areas in addition to the regulatory audit. FINMA also has the option of having such audits carried out by commissioning audit or investigating agents. FINMA can also request a change of audit company in justified cases (see Art. 28*a* para. 2 FINMASA).

16.5.2 International comparison

As a rule, foreign supervisory authorities carry out the audit of compliance with supervisory provisions themselves, and involve external audit companies only occasionally.

The PRA in the UK, for example, provides a comprehensive manual on its supervisory activities.[548] It has also published principles on how it coordinates with external auditors.[549]

In the EU, the Single Supervisory Mechanism (SSM) of the European Central Bank supervises the largest institutions. The SSM employs its own staff for supervisory reviews and works together with the national supervisory authorities. In the USA, the supervisory authorities generally employ their own staff for regulatory audits.[550]

Liechtenstein and Luxembourg, on the other hand, use a supervisory approach similar to Switzerland's.

16.5.3 Assessment

The regular use of audit companies to review compliance with supervisory provisions by supervised persons and entities is a central and established supervisory concept. In connection with the incidents at Credit Suisse, there are no known indications to date that the independence of Credit Suisse's audit company was impaired. Nevertheless, a fundamental review of the design of the control mechanisms and the way in which the audit companies are engaged is advisable (see possible measures below). This could further reduce conflicts of interest inherent in the existing supervisory system.

Switzerland has a financial centre of international importance and is home to one G-SIB, UBS, and three non-internationally active SIBs. For this reason and due to the dependencies associated with the current system, it is necessary to review whether the dual system is still useful for effective and efficient supervision.

16.5.4 Possible measures

16.5.4.1 Strengthening of control mechanisms

To additionally strengthen the independence of audit companies, this measure is intended to further restrict or completely prohibit advisory mandates. The applicable rules in the FMAO-FINMA Ordinance would be tightened. Currently, regulatory audit companies are essentially prohibited from taking on engagements that relate to areas relevant to supervisory law, i.e. where there is a risk that the audit company will later have to review the results of its own work.

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[544] Article 7 FMAO-FINMA (SR **956.161**) and FINMA, Circular 2013/3 Auditing, paras 44.1 et seq.

[545] Art. 730*a* para. 2 CO and Art. 8 para. 1 FMAO-FINMA, referred to as internal rotation

[546] Art. 11 para. 1 let. a AOA, referred to as economic independence

[547] FINMA, Circular 2013/3 Auditing, para. 87 and para. 87.1

[548] Bank of England, The Prudential Regulation Authority's approach to banking supervision, July 2023

[549] Bank of England, The relationship between the external auditor and the supervisor: a code of practice, April 2013

[550] Federal Reserve, Approaches to Bank Supervision, website; OCC, Approach to Federal Branch and Agency Supervision, October 2017; FDIC, Supervision Program, website, 2 August 2022

This measure has the potential disadvantage of restricting competition, as audit companies would be limited in their activities. Apart from this measure, other aspects could reduce potential conflicts of interest or improve audit quality in general, and should be examined. For example, the introduction of mandatory rotation for (regulatory) audit companies, as already exists and is recognised in the majority of foreign countries, should be considered. This could be sensibly combined with a minimum engagement duration for the regulatory audit of 3 years, for example, so as to deprive supervised persons and entities of a means of exerting pressure on the audit companies. Over time, mandatory rotation should also prevent the currently observable concentration of engagements for the regulatory audit of systemically important banks at a single audit company.

The extent to which the rotation obligations within the audit teams for an audit engagement need to be adjusted should also be examined. Another possible measure is the creation of a stronger right of FINMA to participate in the choice or change of audit company. The audit strategies prescribed by FINMA already represent a control and steering mechanism for the use of audit companies. FINMA is responsible for regularly reviewing these strategies and ensuring that they continue to be useful. Even if the engagement of audit companies by supervised persons and entities is retained, FINMA is free under financial market legislation to carry out more of its own supervisory activities (e.g. based on Art. 23 BankA).

16.5.4.2 Direct engagement by FINMA

To further counter potential conflicts of interest of audit companies, FINMA would be able to engage audit companies directly for regulatory audits as part of this possible measure.[551] The existing engagements under private law would be terminated and FINMA would allocate engagements directly. It would select the firm responsible for the regulatory audit for each supervised person and entity and engage it to carry out the audit. FINMA would subsequently also decide on the reallocation of engagements.

This can strengthen the independence of audit companies and improve their professional scepticism. Audit companies would then tend to be able to carry out audits impartially and report irregularities and shortcomings to FINMA without fear of suffering economic disadvantages in other areas. This can make it easier and quicker for FINMA to obtain information which, following FINMA's investigations, ultimately leads to the discovery of serious violations of supervisory law.

With direct engagements, FINMA can also avoid concentrations of audit engagements insofar as it distributes the engagements evenly among the audit companies in question. Furthermore, the Swiss supervisory system would move closer to the standard international approach. The introduction of direct engagements could be sensibly combined with the strengthening of control mechanisms as described above – in particular with the prohibition of advisory services.

There are also disadvantages associated with direct engagement. Due to the large sums involved, FINMA would probably have to award the engagements in accordance with public procurement rules. This process is time-consuming and restricts the degree of freedom in the award process. FINMA's steering options may be limited when awarding contracts. Today, audit companies are engaged by supervised persons and entities according to market forces. This means that these forces steer the development of the audit companies, the training of specialist skills, market shares, etc. FINMA would have to take this into account when engaging audit companies directly. FINMA would also be bound by the principle of competitive neutrality, and it would have to monitor audit costs and the independence of audit companies in a targeted manner, bearing in mind that the latter is already the responsibility of the FAOA.

As there are considerable synergies between the financial and regulatory audits, splitting these audits between two firms would entail considerable additional costs for the supervised persons and entities. Supervised persons and entities would therefore regularly work to ensure that the regulatory audit company would also be engaged as the external financial auditor. This arises as a result of the fact that there are only a few audit companies capable of auditing Banks or G-SIBs, and that one of these audit companies is generally engaged as an adviser and is therefore unavailable for the audit. This means that FINMA would indirectly co-determine the external financial auditors by appointing the regulatory audit company. In effect, the shareholders would have only limited freedom of choice in light of the indirect designation of the external financial auditor by FINMA.

[551] The extent to which direct engagement of audit companies for the regulatory audit would also apply to the licensing audit under financial market law would have to be examined separately as part of implementation

It is also unclear whether direct engagement actually achieves an additional reduction in potential conflicts of interest for the audit company. It is certainly possible that the audit company engaged by FINMA would continue to pursue its own interests in order to please the supervised persons and entities being audited or FINMA. The change of audit company would also involve considerable effort on the part of both supervised persons and entities and FINMA.

The role of the board of directors and its audit committee would be diminished. These bodies would no longer be responsible for ensuring the quality of the regulatory audit. In connection with the responsibility of the board of directors (Arts. 754 et seq. CO), there could even be a de facto release from liability of the board of directors to a certain extent (FINMA would have had the lead, and the state would be more attractive as a defendant).
Finally, FINMA and the Confederation could be sued on the basis of state liability because, in the view of the plaintiff, FINMA appointed the wrong audit company or changed the audit company too late.

Should this measure be implemented, it would also be necessary to examine the impact on the FAOA's supervisory activities if FINMA always acts as the client.

16.5.4.3 Abolish dual supervision

Another conceivable measure is for FINMA to carry out the regulatory audit entirely by itself. Taking the audit in-house would ensure ongoing knowledge development at FINMA and strengthen supervision. At the same time, FINMA's resources would have to be significantly expanded, which would be a considerable challenge in the labour market, and the business area of regulatory auditing would be taken away from the audit companies. Furthermore, state liability issues would arise even more than in the case of direct engagement by FINMA.

16.5.5 Conclusion

The use of audit companies as an extended arm of FINMA is an established supervisory instrument. Given the current level of resources, FINMA relies on audit companies to independently review compliance with supervisory law. The measures to strengthen the control mechanisms (see section 16.5.4.1) or for the direct engagement of audit companies by FINMA (section 16.5.4.2) can further strengthen independence. Against this background, implementation appears desirable.

Because this is a fundamental element of supervision, all financial institutions are potentially affected by such a measure. However, further clarifications are required for a conclusive assessment. In particular, in the case of direct engagement, it must be clarified what operationalisation would look like and whether it would actually be advantageous in terms of the independence of the audit company. In addition, any findings of the PInC in connection with the audit companies should also be incorporated into the further work.

The more radical adjustment in the form of abolishing the dual supervision system should also be examined. In principle, this can contribute to greater effectiveness and efficiency and thus to a strengthening of supervision in Switzerland, which is especially relevant in the case of SIBs. However, such a redesign would also lead to major challenges for implementation, not least due to the impact on the labour market. For these reasons, the measure should be examined specifically for SIBs as a first step.

16.6 Duration of procedures

16.6.1 Background

If FINMA considers higher bank-specific capital or liquidity requirements to be necessary for a SIB and the bank does not voluntarily comply with these higher requirements, FINMA must issue a ruling in accordance with the APA,[552] stating the grounds. The procedural rules to be observed (including granting the right to be heard, recusal, exchange of written submissions, deadlines with the possibility of extension, suspensive effect, appeal to the Federal Administrative Court and then to the Federal Supreme Court) mean that it is possible only to a limited extent for FINMA to implement such a ruling immediately (e.g. by means of immediate enforceability and removal of the suspensive effect of any appeal). It may take several years before a final decision is ultimately rendered by the Federal Supreme Court.

When regulating court and administrative proceedings in Switzerland, the fundamental procedural rights laid down in the Federal Constitution must be observed. As minimum guarantees, they form one of the cornerstones of the rule of law and serve as a guideline for the interpretation of legislation. In administrative proceedings, the general procedural guarantees of Article 29 Cst. (including equal and fair treatment, decision within a reasonable

552 SR **172.021**

time, right to be heard) and the guarantee of access to the courts under Article 29a Cst. (right to have a dispute heard by a court) are especially relevant. Any amendments to administrative procedural law will have to take these limits into account.

16.6.2 International comparison

A comparison with foreign procedures would have to be carried out as part of an in-depth examination. Foreign administrative organisations and their procedural rules all have their own specific characteristics that cannot simply be transferred to Switzerland and therefore do not provide any indications of possible options for action. Nevertheless, it should be noted that several jurisdictions – such as Germany – have legislative provisions that allow for the immediate enforceability of certain rulings.[553]

16.6.3 Assessment

In practice, the sometimes long duration of procedures (procedure for issuing the ruling and any subsequent appeal proceedings) turns out to be problematic when a FINMA ruling needs to be enforced quickly in order to ensure the stability of the SIB concerned or even the banking system and the economy as a whole. In such cases – alongside the existing options (in particular the ordering of precautionary measures and immediate enforceability[554]) – it is therefore desirable in principle to make adjustments to administrative procedural law to speed up the procedures.

16.6.4 Possible measures

In line with the definition of the problem above, the following possible measures focus on SIBs, in particular with regard to bank-specific higher capital or liquidity requirements.

16.6.4.1 Exclusion of appeal to the Federal Supreme Court

The current method of appeal for a FINMA ruling leads via the Federal Administrative Court to the Federal Supreme Court. The Federal Supreme Court Act lists numerous decisions by the Federal Administrative Court in various areas against which no appeals to the Federal Supreme Court are admissible in matters of public law (Art. 83 of the Federal Supreme Court Act of 17 June 2005[555]). To shorten the duration of procedures, it would be worth examining whether an appeal to the Federal Supreme Court should be excluded for at least certain FINMA rulings that might need to be specified in more detail.

16.6.4.2 Introduction of time limits in the appeal procedure

The APA does not contain any specific time limits (apart from the period for filing an appeal) for the procedural actions of the parties or the appellate authority. A FINMA ruling in the matters of interest here is made as part of its supervisory activities in an ongoing mutual exchange with the SIB and is usually preceded by detailed preliminary proceedings with the granting of the right to be heard (unless an ex parte interim ruling is issued). Because the bank concerned is therefore usually already sufficiently familiar with the matter in dispute, it would be worth examining whether (non-extendable) time limits should be established by law, in particular for the procedural submissions of the parties in the appeal procedure.

Here again, the procedures or matters in dispute to which these time limits should apply would have to be specified in more detail. In this context, it could also be examined whether the appellate authority should be given a time limit for assessing an appeal in special cases designated as a priority.

16.6.4.3 No examination of adequacy in the appeal procedure

In an appeal against a FINMA ruling, the SIB may contend that (1) there has been a violation of federal law including the exceeding or abuse of discretionary powers, (2) there has been an incorrect or incomplete determination of the legally relevant facts of the case or (3) the ruling is inadequate (Art. 49 APA). As far as the examination of inadequacy is concerned, the plea of inadequacy is not constitutionally required either by the guarantee of access to the courts in Article 29a Cst. or by the general procedural guarantees in Article 29 Cst.

[553] Due to the urgency and non-postponability recognised by the German legislator, BaFin's orders to avert danger are usually immediately enforceable or the legal remedies against such measures have no suspensive effect by law (see § 49 of the Banking Act, § 310 (2) of the Insurance Supervision Act and § 13 of the Securities Trading Act). In order to protect themselves against immediate enforceability, persons whose rights are directly affected by the BaFin order can apply to the court for an order of suspensive effect (see § 80 (5) of the Code of Administrative Court Procedure)

[554] For details, see FINMA, Precautionary measures, website

[555] SR **173.110**

It could therefore be examined as a measure whether the plea of inadequacy should be excluded by special law for procedures or matters in dispute to be specified in more detail and whether doing so would be compatible with the procedural guarantees of the Federal Constitution and the ECHR. In the area of the FINMA rulings in question (see the definition of the problem), appeals based solely on inadequacy would no longer be admissible, and appeals relying on other pleas would at least be less extensive and could potentially be dealt with more quickly.

16.6.4.4 Removal of the suspensive effect of an appeal against a FINMA ruling

Under current law, an appeal against a FINMA ruling has suspensive effect. This can be removed by FINMA in the ruling – if it does not relate to the payment of money – but then reinstated by the appellate authority (Art. 55 APA). If the aim is to ensure that a SIB must implement FINMA's ruling immediately, the suspensive effect of the appeal could be removed by law. Removal combined with immediate enforceability would thus be the legal rule and would no longer have to be specifically ordered by FINMA.

In such cases, a bank concerned could request precautionary measures from the appellate authority, for example to preserve the situation prevailing prior to the ruling (Art. 56 APA). However, alternating compliance and then non-compliance with the measure ordered in the ruling during ongoing proceedings may, for example, not appear appropriate for reasons of system stability. It should therefore be examined whether FINMA rulings in the context of interest here *(see section 16.6.3)* could be made immediately enforceable by law – despite an ongoing appeal procedure. In particular, it should be examined whether and, if so, with which offsetting mechanisms the guarantee of legal recourse can be taken into account.

16.6.5 Conclusion

The possible measures listed above are aimed at shortening the duration of proceedings, which in the case of SIBs can have a decisive benefit for safeguarding financial stability. They are therefore desirable in principle. On the other hand, some of the measures interfere significantly with procedures under administrative procedural law. Thus, for reasons of proportionality, they should be limited to certain cases of application that affect SIBs and require further comprehensive legal clarification before being implemented. It must therefore be examined in detail whether and which of these measures should already be implemented.

16.7 Responsibility of the FINMA Board of Directors

16.7.1 Background

The tasks of the FINMA Board of Directors are set out in the FINMASA:[556] The Board of Directors is the strategic management body of FINMA and in this function determines the organisational framework for FINMA's operational activities (e.g. issuing the organisational regulations, appointing and supervising the Executive Board, and ensuring internal controls) and adopts regulatory principles (ordinances delegated to FINMA and circulars on the application of financial market law). It also decides on matters of substantial importance.

In principle, the Chair of the Board of Directors holds office on a full-time basis.[557] The other members of the Board of Directors perform their duties as a secondary occupation. As the Board of Directors makes its own decisions on matters of substantial importance, its members must be independent of the supervised persons and entities.[558]

[556] Art. 9 para. 1 FINMASA

[557] Art. 9 para. 4 FINMASA and BBl **2006** 2829, p. 2865. Secondary employment (e.g. teaching at a university) of the Chair of the Board of Directors is compatible with the office if it is in the interests of FINMA's performance of its responsibilities

[558] Art. 9 para. 2 FINMASA and BBl **2006** 2829, p. 2864

Based on feedback from the consultation procedure, the Federal Council included the FINMA Board of Directors' responsibility for matters of substantial importance in the 2006 FINMASA draft. Many participants in the consultation procedure, including the Swiss Bankers Association and economiesuisse, were of the opinion that major decisions should be made by the Board of Directors in the interest of checks and balances. According to this view, the Board of Directors should decide in those cases of FINMA's operational activities in which creditors, investors, insured persons or the functioning of the financial markets are significantly affected.559 Otherwise, the FINMASA stipulates that the Board of Directors should be responsible only for strategic matters and decisions. It is thus largely relieved of day-to-day business and can devote itself to the long-term leadership of FINMA.[560] In the wake of the 2007-08 financial crisis, the Federal Council confirmed in 2010 that the Board of Directors is responsible for matters of substantial importance and suggested that FINMA interpret the term narrowly, taking into account that the Board of Directors is responsible for strategic matters and decisions, and that operational activities generally lie with the Executive Board.[561]

In 2014, the Federal Council argued that the power of the Board of Directors to also decide on matters of substantial importance provided a balance between the Board of Directors and FINMA's Executive Board, thereby ensuring balanced decision-making and the development of relevant practice. The Federal Council also argued that matters of substantial importance and strategic decisions are directly related and difficult to demarcate. For example, matters of substantial importance not only influence FINMA's general strategy, but can also have an impact on FINMA regulation (ordinances and circulars) in particular, which is decided by the Board of Directors. The Federal Council thereby also responded to the IMF's suggestion in the 2014 Financial Sector Assessment Program (FSAP) that the Board of Directors' power to decide on matters of substantial importance should be restricted or more clearly defined.[562]

The FINMA Board of Directors has defined the matters of substantial importance in the FINMA Organisational Regulations based on the FINMASA dispatch and further refined the definition following the Federal Supreme Court judgment.[563] According to this definition, matters of substantial importance include business matters relating to supervised institutions in supervisory categories 1 and 2 (i.e. SIBs), including protective measures, recovery and (bankruptcy) liquidation.

16.7.2 Assessment

As outlined above, the powers of FINMA's Board of Directors to make decisions on business matters of substantial importance was a recurring theme both during and after the establishment of FINMA, with the Federal Council weighing up the arguments for and against in the light of current experience and knowledge.

In the Credit Suisse case, the PInC is currently investigating and assessing the management of FINMA.

The Federal Council last commented in 2014 on the FINMA Board of Directors' responsibility for business matters of substantial importance. The insights gained in recent years therefore indicate that the advantages and disadvantages of the current division of responsibilities between the Board of Directors and the Executive Board should be re-examined.

16.7.3 Possible measures and conclusion

The review of the Board of Directors' responsibility for business matters of substantial importance should also include a comparison with the governance of comparable organisations. It must be assessed whether the current division of labour is justified in terms of the effectiveness of supervision and whether measures are necessary. Any findings of the PInC must also be taken into account as part of this examination.

Specifically, the advantages and disadvantages of transferring responsibility for business matters of substantial importance to the Executive Board should be examined.

559 BBl **2006** 2829, p. 2840

560 BBl **2006** 2829, p. 2840

561 Federal Council report, Das Verhalten der Finanzmarktaufsicht in der Finanzmarktkrise – Lehren für die Zukunft, 12 May 2010

562 Federal Council report, Die FINMA und ihre Regulierungs- und Aufsichtstätigkeit, 18 December 2014, pp. 9 f.

563 FINMA, Regulations on the organisation of the Swiss Financial Market Supervisory Authority FINMA, 1 December 2023, Art. 2bis

16.8 FINMA resources

The current legislative mandate, the possible expansion of FINMA's toolkit discussed in this report and the supervision of the (enlarged) UBS entail that FINMA must have adequate resources, both quantitatively and qualitatively.

The report of the Expert Group on Banking Stability takes up the widespread view that FINMA was facing staffing constraints in dealing with the Credit Suisse case and that an expansion of resources appears to be crucial, in particular in the Recovery and Resolution division and in the supervision of UBS. The Expert Group further states that FINMA should ensure that it has sufficient leeway in terms of remuneration to attract high-calibre, seasoned professionals from the financial services sector.[564]

The Tarullo expert opinion recommends a significant increase in resources for the supervision of UBS.[565]

FINMA is responsible for determining and procuring the resources required to perform its responsibilities. The Federal Council accordingly expresses its expectation that FINMA will equip itself with the necessary number and quality of resources, taking into account its new responsibilities. In addition, the results of the PInC will show the extent to which measures are necessary in terms of resources.

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564 Expert Group on Banking Stability 2023, The need for reform after the demise of Credit Suisse, 1 September 2023, p. 59

565 Tarullo expert opinion, pp. 4 f.

17 Responsibilities and cooperation of the authorities in the area of financial stability

17.1 Background

17.1.1 Context

In addition to the regulatory requirements, cooperation between the involved authorities and their powers and responsibilities in the area of financial stability are also crucial for the successful prevention and management of financial crises. These aspects are accordingly also reviewed in the aftermath of financial crises. This was the case in particular after the global financial crisis of 2007-08.

At that time, the FSB created new standards, and the TBTF regime was strengthened in the relevant jurisdictions. Institutional adjustments were also made in several jurisdictions with important financial centres; in the USA, the EU and the UK, for example, central banks were given stronger roles in the supervision and resolution of SIBs.

Already before the financial crisis, Switzerland had decided to strengthen the independence of supervision. With effect from 1 January 2009, FINMA was detached from the Federal Administration and converted into an independent authority. Unlike in other jurisdictions, however, the SNB was not assigned any further tasks in the oversight and resolution of SIBs. In the aftermath of the financial crisis, the Federal Council has not identified any fundamental need for action with regard to the institutional framework.[566]

The question of a potential need for adjustments to the responsibilities and cooperation between the relevant authorities also arose during the review of the Credit Suisse crisis. In the view of the Federal Council, however, the results of the PInC should be awaited and included in the discussion on the institutional framework.

17.1.2 Current institutional framework in Switzerland

In Switzerland, several authorities are entrusted with promoting and maintaining financial stability. The central players are the Federal Council and the FDF (regulation), FINMA (supervision, restructuring and resolution) and the SNB (macroprudential oversight, stability of the financial market, LoLR).

The FDF, FINMA and the SNB are independent of each other. Apart from powers to exchange information, there are hardly any legislative provisions governing cooperation in the areas of financial stability and financial market regulation. Such cooperation has so far been regulated in a memorandum of understanding (MoU). The MoU covers the exchange of information and specifically cooperation in the event of a crisis that could threaten the stability of the financial system (see section 5.2 for a description of the crisis organisation).[567]

Another MoU has been concluded between FINMA and the SNB that defines the tasks of the two institutions, describes the common areas of interest and regulates cooperation in the area of financial stability.[568]

17.2 International comparison

There are major differences internationally between the institutional structure of responsibilities in the areas of banking supervision, macroprudential oversight, the LoLR function, restructuring and resolution. A distinction can be made between two approaches – consolidation of the various tasks under the umbrella of a single authority (single-authority approach) and division of these tasks

[566] Federal Council, Das Verhalten der Finanzmarktaufsicht in der Finanzmarktkrise – Lehren für die Zukunft, 12 May 2010. See also Federal Council press release, Conclusions drawn from the financial market crisis for financial market supervision, 12 May 2010

[567] FDF et al., Memorandum of Understanding on trilateral cooperation in the area of financial stability and financial market regulation between the FDF, FINMA and the SNB, 2 December 2019

[568] FINMA and SNB, Memorandum of Understanding in the field of financial stability, 15 May 2017

among several authorities (multiple-authority approach).[569] In the UK, the supervision and resolution of SIBs and the LoLR function are the responsibility of the Bank of England. In contrast, the tasks in the EU and the USA are divided between several independent authorities.

Unlike in Switzerland, in many countries (such as in the USA, the EU and the UK) the supervision of SIBs is carried out by the central bank, in part because central banks have greater experience in dealing with market-wide and systemic stress events, are better able to recruit on the labour market and can therefore make better use of synergies between microprudential supervision and macroprudential oversight.[570]

Moreover, the various powers and responsibilities are more explicitly defined in the relevant jurisdictions. For example, crisis cooperation is often part of a stability council created for macroprudential oversight. Examples of this are the Financial Stability Oversight Council (FSOC) in the USA and the European Systemic Risk Board (ESRB). Such a stability council typically consists of members of the supervisory authority, the central bank and the finance ministry, and possibly also of independent experts. Another feature of these councils is that they are accountable to the public for their work. The FSOC and the ESRB publish annual reports in which they present their assessments of potential threats to financial stability as well as analyses.

17.3 Assessment

In the Credit Suisse crisis, the Federal Council is of the view that the crisis management of the Swiss authorities worked well overall. Assessments, measures and solutions were discussed and developed under enormous time pressure, in direct and intensive cooperation between the FDF, FINMA and the SNB starting in autumn 2022. Ultimately, a situation-specific solution was able to be put into practice within a very short time in mid-March 2023 (see sections 5.3 und 5.4).

The experiences in the crisis highlight the importance of prompt and comprehensive information, constructive cooperation between the authorities for all options for action, the appropriate level of decision-making and coordination, as well as the assumption and allocation of responsibility among the authorities.

With regard to crisis cooperation, the trilateral MoU[571] between the FDF, FINMA and the SNB shows that Switzerland's basis for cooperation is relatively narrow and not very formal. In the relevant foreign jurisdictions, more formal bodies are provided for this purpose, and the powers and responsibilities are defined more explicitly. Clear responsibilities are especially important in situations where the intervention of the authorities can have a procyclical effect and decisions therefore tend to be made late. Efficient exchange of information between the authorities before and during a crisis is also an important prerequisite for successful crisis management.

17.4 Possible measures and conclusion

Changes to the existing institutional framework for the supervision, resolution and crisis management of SIBs could mean a closer consolidation of macroprudential oversight and microprudential supervision of SIBs (e.g. by shifting prudential supervision of SIBs to the SNB), or a possible strengthening of cooperation among the authorities to prevent crises or during crises (e.g. by creating a stability council). Clearer rules governing cooperation – especially with respect to planning and implementing a resolution – are also conceivable.

The Federal Council proposes examining adjustments to institutional responsibilities and in relation to cooperation between the authorities, with a view to strengthening the crisis management framework. However, the results of the PInC must first be awaited and taken into account as needed.

569 Alvarez & Marsal expert opinion

570 Alvarez & Marsal expert opinion

571 FDF et al., Memorandum of Understanding on trilateral cooperation in the area of financial stability and financial market regulation between the FDF, FINMA and the SNB, 2 December 2019

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Overview of expert opinions

As described in section 1.2, the FDF was explicitly instructed by the Federal Council to include external expert opinions in its work on this report. These expert opinions are available from the FDF website:

- Prof. Daniel K. Tarullo: Swiss Too-Big-To-Fail Approach and the Feasibility of Resolution
- Prof. Isabelle Häner, LL.D: Pecuniary administrative sanctions in financial market law
- PA Consulting: Individual Accountability Regimes: A Comparative Report
- Sir Paul Tucker: Regimes for Lender of Last Resort Assistance to Illiquid Monetary Institutions: Lessons in the Wake of Credit Suisse
- Prof. Winfried Ruigrok and Dr Lin Wei: Regulating Executive Remuneration at Swiss Global Systemically Important Banks
- Alvarez & Marsal Management Consulting: International Comparison of Key Jurisdictions' Institutional Setup for the Supervision and Resolution of Banks
- Prof. Aymo Brunetti: Brief expert opinion on the definition of systemic importance and on state support for banks

Overview of parliamentary procedural requests

The report addresses numerous issues and concerns arising from parliamentary procedural requests relating to the Swiss TBTF regulations and the Credit Suisse case.
The postulates which had been transmitted by Parliament to the Federal Council at the time of publication of this report and are addressed in this report are listed in section 1.2. That section also lists other referred postulates that are being addressed outside the context of this report.
The following parliamentary procedural requests – some of which had not yet been conclusively dealt with by Parliament at the time of publication of this report – are also addressed in this report:

- "No payment of bonuses for systemically important banks" (motion 21.3909 from National Councillor Birrer-Heimo)
- "Higher capital requirements for globally active big banks" (motion 21.3910 from National Councillor Birrer-Heimo)
- "Swiss financial centre. Find a lasting solution for the too-big-to-fail issue" (motion 23.3217 from Councillor of States Minder)
- "Credit Suisse debacle: hold senior financial market executives more accountable for mismanagement" (interpellation 23.3417 from National Councillor Glättli)
- "No more too-big-to-fail Swiss banks" (motion 23.3449 from Councillor of States Chiesa)
- "Ensure the independence of the external audit of too-big-to-fail banks" (postulate 23.3450 from Councillor of States Z'graggen)
- "Limit remuneration in the banking sector" (motion 23.3452 from Councillor of States Stark)
- "No more Swiss too-big-to-fail banks" (motion 23.3456 from Swiss People's Party Group)
- "Link state guarantees for banks to sustainability criteria" (motion 23.3460 from National Councillor Ryser)
- "Increase the responsibility of top management at systemically important banks"(motion 23.3462 from National Councillor Burgherr)
- "Guarantee fund. Clarify systemic importance and provide compensation for implicit state guarantee" (motion 23.3485 from National Councillor Fischer)
- "No payment of bonuses at systemically important banks" (motion 23.3494 from Councillor of States Sommaruga)
- "Regulations concerning variable remuneration" (motion 23.3495 from Councillor of States Caroni)

The following parliamentary procedural requests that had already been dealt with at the time of publication of this report, for instance as a result of being rejected by Parliament or withdrawn, are also addressed in this report:

- "Link state guarantees for banks to social criteria" (motion 23.3458 from National Councillor Porchet)
- "Separate the Swiss business of the former Credit Suisse from UBS and transform it into a public-interest climate bank (motion 23.3474 from National Councillor Glättli)
- "State aid in line with Swiss sustainability goals" (motion 23.3475 from Green Group)
- "Higher deposit insurance" (motion 23.3477 from Green Group)
- "A segregated banking system for systemically important banks" (motion 23.3478 from Green Group)
- "Compensation for state guarantee" (motion 23.3479 from Green Group)
- "Ethical and sustainable management in the financial sector and in state-affiliated enterprises (risk minimisation)" (postulate 23.3482 from National Councillor Gugger)
- "Compensation from systemically important banks for the implicit state guarantee" (motion 23.3483 from National Councillor Suter)
- "Expand the deposit insurance" (interpellation 23.3484 from National Councillor Masshardt)
- "Strengthen FINMA" (motion 23.3492 from National Councillor Atici)
- "Does the cancellation of bonuses solve the general problem of system of false incentives?" (interpellation 23.3584 from National Councillor Binder-Keller)
- "Financial centre strategy for the future" (motion 23.3602 from FDP.The Liberals Group)
- "In favour of tightening the criminal law provisions for banks in Switzerland" (motion 23.3853 from National Councillor Amoos)

Motion 23.3604 "Better protection of vested benefits and Pillar 3a balances" from Councillor of States Hegglin was approved by Parliament on 6 March 2024. The Federal Council plans to include this in the revision of the Banking Act as part of the work on TBTF.

The two motions "Systemically important companies. Ensuring decisions in the interests of Switzerland" (23.3448 from Councillor of States Chiesa) and "Systemically important companies. Ensuring decisions in the interests of Switzerland" (23.3455 from National Councillor Matter) are not discussed, as they are aimed at systemically important companies in general and thus go beyond financial market law.

List of abbreviations

ABS	Asset-backed securities
ACLA	Federal Act of 22 March 1974 on Administrative Criminal Law (SR 313.0)
AT1	Additional Tier 1 capital: in balance sheet terms, represents a debt
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht: the German financial market supervisory authority
BankA	Banking Act of 8 November 1934 (SR 952.0)
BankO	Banking Ordinance of 30 April 2014 (SR 952.02)
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
BRRD	"Bank Recovery and Resolution Directive: European Parliament and Council directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L 173 of 12.6.2014, p.190)"
CAO	Capital Adequacy Ordinance of 1 November 2017 (SR 730.01)
CartA	Cartel Act of 6 October 1995 (SR 251)
CCyB	Countercyclical capital buffer
CDS	Credit default swap: credit derivative that allows the default risk on bonds, loans or borrower names to be traded
CET1	Common Equity Tier 1: the first tier of core capital. This is the highest quality of capital held by a bank, such as paid-up share capital
CFC	Committee on Financial Crises: crisis organisation set up by the Swiss financial market authorities
CFP	Contingency funding plan: a bank's plan to ensure that it is sufficiently responsive to major liquidity and funding shortfalls as a going concern
CFTC	Commodity Futures Trading Commission: US regulatory authority for futures and options trading
CGFS	Committee on the Global Financial System
CMG	Crisis management group: forum for ongoing exchanges about a bank between the supervisory authorities of the countries in which the bank is active
CO	Swiss Code of Obligations (SR 220)
CS	Credit Suisse
Cst.	Federal Constitution (SR 101)
DEBA	Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (SR 281.1)
DoJ	US Department of Justice
DTA	Double taxation agreement
EATC-N/ EATC-S	Economic Affairs and Taxation Committees of the National Council and the Council of States
EBA	European Banking Authority
ECB	European Central Bank
ECHR	European Convention on Human Rights of 4 November 1950 (SR 0.101)
EEA	European Economic Area
ELA	"Emergency liquidity assistance: in its function as lender of last resort, the SNB provides domestic banks with emergency liquidity"
ELA+	"Emergency Liquidity Assistance Plus: additional emergency liquidity assistance provided by the SNB during the Credit Suisse crisis. Secured by preferential rights in bankruptcy"
ESM	European Stability Mechanism
FAOA	Federal Audit Oversight Authority
FCA	Financial Conduct Authority: one of the financial market supervisory authorities in the UK (see also PRA)
FC-N/FC-S	Finance Committees of the National Council and the Council of States
FDIC	Federal Deposit Insurance Corporation: US authority responsible for, in particular, deposit insurance and the resolution of financial institutions
FDF	Federal Department of Finance
Fed	Federal Reserve System: the US central bank
FinDel	Finance Delegation of the Federal Assembly
FinIA	Financial Institutions Act of 15 June 2018 (SR 954.1)
FINMA	Swiss Financial Market Supervisory Authority
FINMASA	Financial Market Supervision Act of 22 June 2007 (SR 956.1)
FinSA	Financial Services Act of 15 June 2018 (SR 950.1)
FoIA	Freedom of Information Act of 17 December 2004 (SR 152.3)
FSB	Financial Stability Board: an international coordinating body for global financial stability
GDP	Gross domestic product

G-SIB	Global systemically important bank: a systemically important bank that is internationally active
HQLA	High-quality liquid assets
IMF	International Monetary Fund
IOA	Insurance Oversight Act of 17 December 2004 (SR 961.01)
IPO	Initial Public Offering
LAC-N/ LAC-S	Legal Affairs Committees of the National Council and the Council of States
LCR	Liquidity coverage ratio: ratio for short-term liquidity or minimum liquidity coverage
LiqO	Liquidity Ordinance of 30 November 2012 (SR 952.06)
LoLR	Lender of last resort
LR	Leverage ratio: ratio of core (Tier 1) capital to total exposure
LSFF	"Liquidity-Shortage Financing Facility: line of credit for commercial banks and financial market infrastructures to cover their short-term funding shortfalls. Provided by the SNB as part of its standing facilities"
MBoA	Mortgage Bond Act of 25 June 1930 (SR 211.423.4)
MergA	Mergers Act of 3 October 2003 (SR 221.301)
MoU	Memorandum of Understanding: agreement between two or more parties
MPoE	Multiple point of entry (see also SPE)
MREL	Minimum requirements for own funds and eligible liabilities in the UK and the EU. Similar to the FSB's TLAC standard
NBA	National Bank Act of 8 November 1945 (SR 952.0)
NCWO	"No creditor worse off: the principle that creditor are not put in a worse position during a bank restructuring than during a bankruptcy"
NSFR	"Net stable funding ratio: structural liquidity ratio or funding ratio. It is aimed at ensuring stable funding over a one-year horizon"
OCC	"Office of the Comptroller of the Currency: authority within the US Department of the Treasury (tasks include: monitoring the national lending system, i.e. also monitoring the payment capability, competitiveness and functioning of US credit institutions)"
OECD	Organisation for Economic Co-operation and Development
OLF	Orderly liquidation fund: fund held at the US Treasury which provides the FDIC with the necessary liquidity for a resolution
PInC	Parliamentary Investigation Committee
PLB	Public liquidity backstop: backup state liquidity for systemically important banks
PONV	Point of non-viability: denotes the moment of impending insolvency
PRA	Prudential Regulation Authority: one of the financial market supervisory authorities in the UK (see also FCA)
PVA	Prudent valuation adjustment: principle of exercising prudence in the valuation of financial instruments
RWA	Risk-weighted assets
SC	Steering committee: strategic committee of the Swiss authorities' crisis organisation
SEC	Securities and Exchange Commission: the US stock exchange regulator
SECO	State Secretariat for Economic Affairs
SIB	Systemically important bank (see also G-SIB)
SIF	State Secretariat for International Finance
SNB	Swiss National Bank
SPoE	"Single point of entry: refers to when a bail-in, for example, is carried out at the level of the uppermost entity in the group, the so-called ""parent"""
SSM	Single Supervisory Mechanism: the system of banking supervision in the EU
TBTF	Too big to fail
Tier 1	T1, core capital. Made up of CET1 and AT1
Tier 2	T2, supplementary capital. In balance sheet terms, represents a debt. Bears losses next after CET1 and AT1 capital
TLAC	"Total loss-absorbing capacity: comprises the total equity and debt that can be used for loss-bearing and recapitalisation in the event of the restructuring or liquidation of a G-SIB. The capital is made up of going-concern and gone-concern assets"
TPO	Temporary public ownership by the state of a financial institution or individual units thereof
WTO	World Trade Organization
ZKB	Zürcher Kantonalbank

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