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CENTRE DE DROIT
BANCAIRE ET FINANCIER

Colloquium: U.S.–EU Comparative Law – Role and Power of Public Agencies

Goethe Universität Frankfurt, 21 Oct 2025

Independence of the Swiss Financial Market Supervisory Authority (FINMA)

Célian Hirsch



UNIVERSITÉ
DE GENÈVE

FACULTÉ DE DROIT



Dimensions of FINMA's Independence

■ 1. Institutional setup

- Public law institution with its own legal personality (Art. 5 FINMASA)

■ 2. Governance

- Federal Council appoints FINMA Board. It comprises 7 to 9 expert and independent members (Art. 9 par. 3 FINMASA)
- Dismissal only for cause by the Federal Council (“if the requirements for holding office are no longer fulfilled”, Art. 9 par. 5 FINMASA)
- Board appoints CEO; Federal Council approves the decision of the Board to terminate the employment of the CEO (Art. 9 par. 5 FINMASA)
- Budget funded via supervisory fees (not Parliament)



Dimensions of FINMA's Independence

■ 3. Oversight mechanisms

- The Board determines the strategic objectives of FINMA and submits them to the Federal Council for approval; review once a year with the Federal Council
- Federal Audit Office & Parliamentary Finance Delegation review
- Judicial review by the Federal Courts



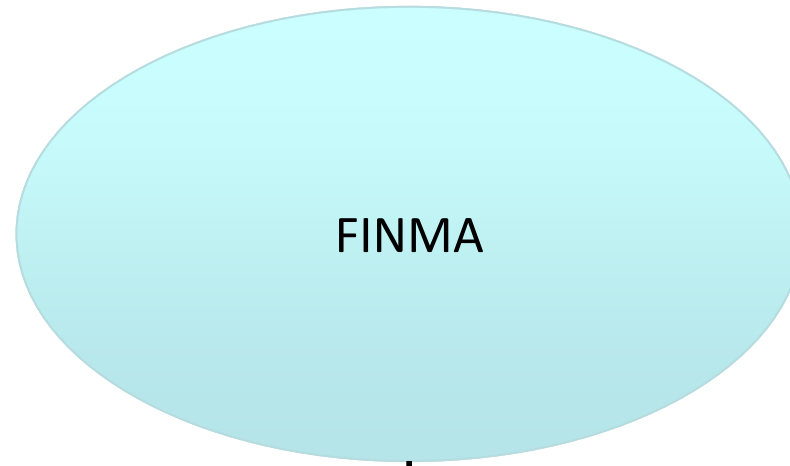
Dimensions of FINMA's Independence

■ 4. Legislative Power

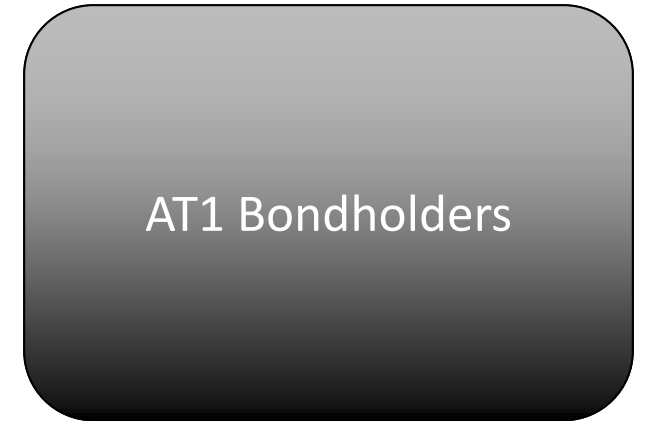
- Ordinance ("where so provided in the financial market legislation", Art. 7 par. 1 lit. a FINMASA)
- Circulars ("on the application of the financial market legislation", Art. 7 par. 1 lit. b FINMASA)
- But, see [Ordinance of the Federal Council relating to FINMASA](#) (2020)
 - „FINMA an der Kandare des Bundesrates?“ ([Prof. Zulauf](#))
 - “Circulars serve exclusively to apply the law and may not contain provisions establishing new rules of law.” (art. 5 par. 2 FINMASA-Ordinance)
 - “For every regulatory project, FINMA prepares impact analyses at an early stage of the process.” (Art. 7 par. 1 FINMASA-Ordinance)
 - “FINMA informs the Federal Department of Finance (...) transparently from the beginning of its regulatory projects, and involves them appropriately in the planning and development of the regulation” (Art. 8 par. 1 FINMASA-Ordinance)



Credit Suisse 2023 - AT1 write-down

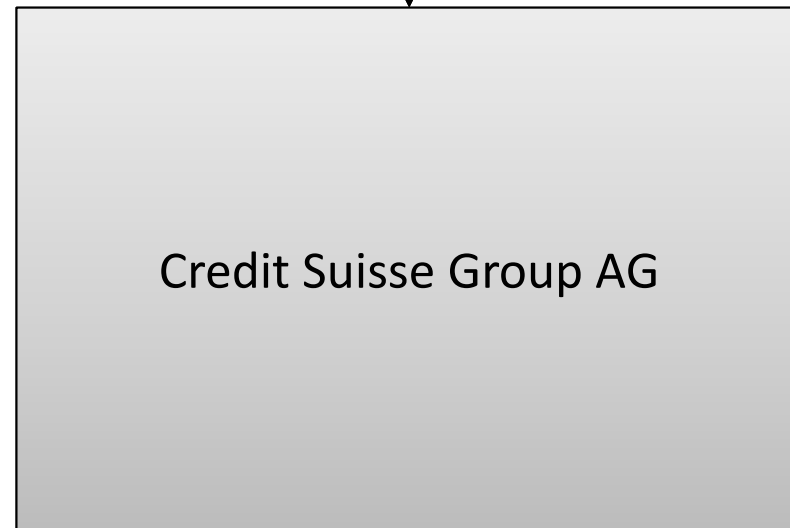


Suffer total loss (USD 20 bn)
Allege violation of the
constitutionnal protection of
the guarantee of ownership



Order to write down and notice (19 March 2023)

1. [Art. 26 Swiss Banking Act](#)
2. [Art. 5a Federal Council emergency ordinance](#)
3. [Terms & Conditions of AT1 \(Viability Event\)](#)



Write-down notice



Credit Suisse 2023 - AT1 write-down

- Federal Administrative Court, [B-2334/2023](#), 1 October 2025 (not definitive, [FINMA will appeal](#))
 - [Viability Event?](#)
 - *Ermessens- und Beurteilungsspielraum*, but “if the interpretation of the contractual provisions is based solely on civil law rules, [there is no place for FINMA’s] “technical discretion” with regard to the interpretation of the AT1 contract terms”
 - “In the currently possible scenario of a merger (...) Credit Suisse does not believe that the contractual requirements are met for a write-down”
 - No Viability Event



Credit Suisse 2023 - AT1 write-down

- Federal Administrative Court, [B-2334/2023](#), 1 October 2025 (not definitive, [FINMA will appeal](#))
 - The AT1 bonds fall within the scope of protection of the guarantee of ownership (art. 26 of the Swiss Constitution)
 - “[Art. 26 of the Banking Act](#) does not provide any clear or explicit legal basis authorizing the [FINMA] to order the bank to disregard the AT1 bondholders’ rights protected by the guarantee of ownership, or to write off the claims”
 - “A [regulatory provision](#) that constitutes only a statute in the material sense does not meet the requirements of (...) the [Federal Constitution](#), since a justification for serious interferences is possible only through a formal law”
 - “the provision of [Art. 5a PLB-NVO](#) contains an impermissible delegation of the Federal Council's emergency powers to the [FINMA]”
 - “the [FINMA] involved a private individual in the performance of its administrative duties by first transferring a right to expropriate the AT1 creditors to [Credit Suisse]. This is only permissible under certain conditions.”
 - The FINMA’s decision is revoked



Thank you for your attention

Any questions?



Art. 26 Swiss Banking Act

FINMA may order protective measures; in particular, it may:

- a. issue instructions to the bank's governing bodies;
- b. appoint an investigator;
- c. withdraw the power of representation from the governing bodies or dismiss them from their functions;
- d. dismiss the audit firm within the meaning of this Act or the auditor appointed under the CO;
- e. restrict the bank's activities;
- f. prohibit the bank from making payments, accepting deposits, or conducting securities transactions;
- g. close the bank;
- h. grant a moratorium or extend deadlines, except for secured claims of mortgage bond issuers.

“According to the understanding of the historical legislator, protective measures within the meaning of Art. 26 BankG should therefore only be issued in the form of supervisory orders that affect the rights of customers and creditors only indirectly.”



- Art. 184(3) Cst.
 - “Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings.”
- Art. 185(3) Cst.
 - The Federal Council “may (...) issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.”
- [Ordinance on additional liquidity assistance loans and the granting of federal default guarantees for liquidity assistance loans from the Swiss National Bank to systemically important banks](#)
 - Art. 5a: “At the time of credit approval pursuant to Article 5, FINMA may order the borrower and the financial group to write down additional core capital.”
- Art. 36 Cst
 1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a formal act. (...)
 3. Any restrictions on fundamental rights must be proportionate.



Terms & Conditions of AT1 (Viability Event)

As used in these Conditions, a 'Viability Event' means that either:

A) the Regulator has notified [Credit Suisse Group (CSG)] that it has determined that a write-down of the Notes, together with the conversion or write-down/off of holders' claims in respect of any and all other Going Concern Capital Instruments, Tier 1 Instruments and Tier 2 Instruments that, pursuant to their terms or by operation of law, are capable of being converted into equity or written down/off at that time, is, because customary measures to improve CSG's capital adequacy are at the time inadequate or unfeasible, an essential requirement to prevent CSG from becoming insolvent, bankrupt or unable to pay a material part of its debts as they fall due, or from ceasing to carry on its business; or

B) customary measures to improve CSG's capital adequacy being at the time inadequate or unfeasible, CSG has received an irrevocable commitment of extraordinary support from the Public Sector (beyond customary transactions and arrangements in the ordinary course) that has, or imminently will have, the effect of improving CSG's capital adequacy and without which, in the determination of the Regulator, CSG would have become insolvent, bankrupt, unable to pay a material part of its debts as they fall due or unable to carry on its business.



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