AFBS Comments
draft Legislation post UBS-CS Case

This AFBS Comments have been elaborated upon exchange with representatives of AFBS Members, including CEOs and Board Members.

The present AFBS Comments are drafted from the perspective of banks of supervisory categories 3-5 whose target market primarily consists of international clients and limited exposure to Swiss domestic clients.

AFBS has contributed to drafting the comments of Swiss Bankers' Association and supports their position.

General Considerations

Proportionality

The main concern of AFBS is to assure legislation upholds the principle of proportionality and compatibility with international standards. AFBS Comments are drafted from the point of view of banks which belong to supervisory categories 3-5 and have a strong international exposure through their shareholder, target market, and/or key clients. The banks are not systemically important but particularly sensitive to regulation which imposes complex administrative procedures. Impact of regulation upon foreign banks in Switzerland must therefore be measured from two perspectives: First, impact of formalistic regulation is disproportionately more burdensome for small- and middle-sized banks as special processes and procedures need to be defined and set up in a lean organisational structure. Second, Swiss Finish, i.e. Switzerland-specific transposition of international standards, imposes particular burden upon affiliates of international banking groups, which apply international standards at group level and need to comply with a specific, slightly different, regulation in Switzerland; this imposes additional cost and complexity that could be avoided.

Resilience of the Swiss financial centre largely consists in the presence of a large number of small banks which are independent from each other. Even if one such bank was to disappear, several other institutes are ready to take over the clients and assure continuity of business. This situation must be preserved and therefore, excessive regulatory burden imposing high cost upon small banks and making it difficult for them to sustain must be avoided. Proportionality must be upheld.

Furthermore, Swiss affiliates of foreign banks are in a special situation as they belong to an international banking group and put focus on international clients which tend to have relationships with several banking institutions. The potential impact of the disappearance of such a bank is considerably minor for the Swiss economy as the disappearance of a bank with main business focus on Swiss domestic clients through retail banking, mortgage, and SME lending.

Also, Swiss affiliates of foreign banks / international banking groups are also in a special situation as they are not subject only to Swiss, but also – through their parent entity – to international regulation. This is true to a large extent with regards to corporate governance and internal controls and organisation.

For the above reasons, AFBS asks for a clear commitment to the proportionality regime. It is of utmost importance to uphold diversity and competitiveness and thus attractiveness of the Swiss financial centre.

Effectiveness of Existing Regulation

The present draft legislation includes a large number of additional supervisory measures to be conferred to FINMA said to be necessary for the effective execution of its role. However, prior to deciding on such important

modification of the supervisory framework, an in-depth assessment of the existing framework shall be performed, including assessment of the tools available, the effective use that has been made of such tools, and the potential additional use that could be made. Once such assessment made, next steps regarding a review of the supervisory framework can be envisaged.

The incident at one financial institute does not justify as extensive an overhaul of the entire financial market regulation including increased obligations to nearly all institutes and extended competence to the supervisory authority without prior in-depth assessment of the present situation and the incident as such. A more comprehensive approach needs to be adopted: tools already available need to be assessed for their availability and effectiveness; their usage in the past needs to be examined; proposed new tools need to be analysed for their compatibility with the existing framework; functioning and effectiveness of potential new tools needs to be assessed taking into consideration the specificities of the local supervisory framework, their compatibility with existing supervisory means and practice; the experiences made in other financial centres – if available – need to be analysed; the cost caused by the introduction of new tools for the supervisory activity and the supervised entities needs to be evaluated.

Terminology

Last but not least and for the sake of clarity, AFBS requests the legislation to give clear guidance to all entities subject. Vague statements such as "wesentliche Geschäftseinheiten", "weitere zentrale Funktionen", "ohne Verzögerung", … must be avoided. They offer excessive margin for interpretation and introduce uncertainty and unpredictability and thus decrease attractiveness.

Specific Aspects of the draft Legislation

Complexity

The explanatory report discusses complexity of a financial institute and identifies as complex those institutes with more than 250 FTE. It concludes that such institutes constitute an accrued risk and thus need to be subject to enhanced prudential regulation. This approach is not satisfactory; the same threshold could as well be set at a level of 500, 1000, 5000 FTE. The approach is equally unsatisfactory as one that would define complexity upon the institute's target market, its target client segment, its product offering.

From one perspective, a bank's focus on specific international markets may be cause for high risk, but not from another perspective: if the bank has specific knowledge and contacts to such markets thanks to group entities and local presence. A bank with international business does not necessarily represent higher risk to a financial centre and a national economy than a bank with primarily local clients such as retail customers and local corporates. The impact of the failure of the latter category of bank may even be higher and more burdensome.

This is to illustrate the fact that segregation of banking groups according to number of employees or type of the business is arbitrary and most probably does not sufficiently reflect reality of the market environment. Adding new criteria to the existing ones already also leads to more complexity and cost for compliance and for supervisory activity. It is not clear why the existing supervisory categorisation ranging from 1 to 5 does not suffice for the purpose. As long as the need for additional categorisation criteria has not been analysed and confirmed, it should not be introduced.

Fitness and Propriety (Senior Manager Regime)

AFBS is opposed to an extension of the scope of the regime of fitness and propriety F&P also proposed as introduction of the Senior Manager Regime SMR. This proposal legislation does neither meet the expectations nor resolve a severe issue in supervisory practice. It merely is an add-on to the existing and well-established regime of F&P, which should be maintained and reinforced in its application.

The SMR is planned to apply to banks of complex organisation, and it is planned to consider as such those banks with staff of more than 250 FTE. This threshold is arbitrary and does not have any link whatsoever with a bank's complexity. A bank may outsource certain functions merely to fall below the threshold; it can thus avoid application of the SMR but most probably also increases complexity and potentially risk for itself and for the market.

The explanatory report presents the SMR as a complement to the already well-established regime of F&P. It states that it applies in most cases to persons that are already subject to the latter, and that the impact of introducing a

new SMR will be limited for banks. F&P of key persons of a bank is a condition for authorisation and for ongoing business conduct. Such conditions need to be fulfilled at any point in time; they can be tested at any moment. Therefore, no further requirement with regards to F&P of key persons needs to be imposed upon banks properly supervised by FINMA.

Introducing SMR beyond key persons and in addition to the existing regime of F&P furthermore bears the risk of contradictory categorisation as not all players in the market can be expected to use the same criteria for defining roles, responsibilities, competencies of persons to be included in the regime. Its reach is excessively broad which leads to excessive complexity and bears the risk of confusion.

Furthermore, Swiss affiliates of international banking groups tend to be integrated into the parent entity's SMR and therefore, key persons of the Swiss entity are already subject to an SMR under supervision of an equivalent financial supervisory authority. Therefore, it does not make sense to impose an additional such regime upon these institutes as it would merely create additional administrative complexity, supervisory burden, and cost.

In its report on banking stability of 2025 Federal Council states that the FINMA regime of F&P is effective if consistently applied.

"Das Gewährserfordernis nach den Finanzmarktgesetzen und die Gewährprüfung durch die FINMA sind zentrale und bei konsequentem Einsatz äusserst wirksame Instrumente der Finanzmarktaufsicht. Somit ergibt sich auf Stufe der gesetzlichen Grundlagen kein grundsätzlicher Handlungsbedarf, wohl aber können punktuelle Verbesserungen bei den Banken ins Auge gefasst werden." [1]

AFBS Position: The introduction of an SMR to all banks with more than 250 employees subjects a large part of banks in Switzerland to an additional, burdensome, mechanism, without adding concrete and proven value. It is contrary to the principle of proportionality as it particularly burdens small- and medium-sized banks.

AFBS Position: AFBS opposes the introduction of a SMR. The elements the regime intends to cover are already governed by the existing regime of fitness and propriety. The criteria can be monitored both at inception and in the ongoing supervisory process. Attribution of responsibility can be set in the internal organisation which can be part of the audit process. If necessary, definition of roles subject to the regime of fitness and propriety can be reviewed. AFBS also opposes further competence given to FINMA with respect to approval of nominations. Such procedures impose unnecessary excessive burden upon the banks, the authority and their interaction, and must therefore be avoided. Supervised entities may be held to report on change of composition of supreme organs and must be able to assume approval without contrary statement from FINMA within a certain deadline.

AFBS Position: If legislator did not agree with suggestions of the report of the parliamentary investigation committee nor with the principle of proportionality and were to uphold its plans to introduce SMR, it must be assured that duplication with internationally applicable regimes is avoided. Thus, Swiss regulation shall exempt from such regulation those banks in Switzerland which belong to an international banking group already subject to an SMR through its presence in another financial centre.

AFBS Position: It is obvious that the persons in charge are responsible for proper conduct of business which takes effect through the institution's behaviour. Therefore, Art 3c I must specify that the persons in charge assure compliance with requirements of fitness and propriety to assure proper conduct of business, but not the bank as such.

Art 3c I: Die ~~Bank und die~~ mit der Verwaltung und Geschäftsführung betrauten Personen müssen Gewähr für eine einwandfreie Geschäftsführung bieten.

Change of Organisation / Nomination

Art 3 and Art 3b draft BankA subject to FINMA approval of material change (Änderung wesentlicher Bedeutung / modification significative) as well as nomination of members of supreme organs.

Draft Legislation plans to subject to FINMA approval change of circumstance which relates to the institute's existing FINMA authorisation. It, however, lacks details regarding content and procedures to be followed in such instances.

Clarity with regards to supervisory procedures is of utmost importance. It does not merely contribute to improve stability and security of the financial centre; it also contributes to its attractiveness and competitiveness in the

[1] Federal Council Report on Banking Stability, 10 April 2024, p 292

international comparison. Clarity of procedure is particularly important in the case of Swiss affiliate of international banking group, where nominations generally are part of an internal process involving various instances; to assure proper processes it is indispensable to assure transparency, predictability of interaction and legal certainty. This is part of assuring international attractiveness of the Swiss financial centre.

Transparency can be introduced by clearly defining requirements, documentation, form, and way of submission of a change of organ, as well as by establishing deadlines within which a response from FINMA is due. To lighten the burden and to follow standards adopted on other international financial centres, it shall be clarified that absence of response within a specified deadline can be considered as tacit approval by the applicant.

First, AFBS agrees to maintain the regime that provides for FINMA approval of nomination of key persons of the bank's supreme organs. However, it does not see any need for extending such obligation to additional persons at different ranks. The nomination of such persons is based upon decisions taken by the supreme organ and following specific internal guidance. Responsibility and competencies remain clearly attributed and can easily be verified based upon internal organisation charts.

Second, submission of change of organ and approval of such change need to be subject to clearly established procedures and deadlines. This is not the case for the time being and shall therefore be clarified in the law. It is of utmost importance to offer clarity, transparency, and predictability for such procedures both with regards to form as well as with regards to duration. Institutes must have clarity for planning.
Procedures are particularly complex for international banking groups which need to obtain approval from various internal instances as well as national supervisory authorities in some cases. To be able to align these procedures it is important for the bank to be able to count on specific deadlines for procedures.

AFBS Position: AFBS agrees to transposing regulation regarding change of organ from Ordinance into Law. However, AFBS asks for clear conditions and deadlines to be defined. FINMA approval for nominations must be restricted to the members of supreme organ and binding deadlines within which such change of organ needs to be processed are to be defined.

Remuneration

AFBS agrees to the proposal of transferring regulation on remuneration to the level of law.

However, the principle of proportionality must be assured throughout. Remuneration policy must clearly not be of the same extent and complexity for a small bank of supervisory categories 3-5 and for a SIB with large and complex internal organisation.

AFBS insists on the regulation being clear, easy to transpose, and transparent. It agrees to transferring into the law basic principles presently enshrined in the FINMA Circular Remuneration and the same time insists on the principle of proportionality to be applied. Since the legislator proposes transposing FINMA regulation into law, there is no need to – at the same time – confer competence to FINMA for additional regulatory; FINMA used to exercise its role through the Circular which is considered as no longer being adequate. If ever, Federal Council shall be entitled to prepare implementation guidance at level of Ordinance.

AFBS also wishes to assure that clawbacks are avoided; it must not be possible to recover remuneration that has already been paid out. This would impose excessive administrative burden and complexity at level of social security, tax and at level of intra-group remuneration plans in case of international banking groups. Such proposals must be avoided as they merely lead to increasing complexity and weakening attractiveness of Switzerland as a place for doing business.

If specific measures of long-term incentivation were to be adopted, they should be so in a different format. Delay of payout or payout tied to certain conditions are means that introduce the long-term dimension of remuneration and at the same time avoid the above-mentioned complexity of clawbacks.

In this point also most foreign banks are in a special situation as they belong to an international banking group. It is understood that the Swiss legislator intends to define its own requirements and standards. However, in the view of attractiveness and international competitiveness, openness towards application of equivalent, international standards for remuneration, must be assured. It must, however, be taken into consideration that foreign banks tend to apply own internal principles governing remuneration, that such standards are defined along international supervisory standards and that they apply throughout the entire banking group thus encompassing key persons in the Swiss entity also. For such instances it must be avoided that specific Swiss regulation applies in parallel with international standards and bears the risk of introducing contradictory requirements that are difficult to comply with.

AFBS Position: AFBS supports abolition of the FINMA Circular Remuneration and transposition of the regulation into Law. AFBS insists on the principle of proportionality being respected when transposing regulation on remuneration into law. AFBS insists on alignment with international standards regulation being assured to avoid discrepancy and contradictory regulation which merely increases complexity and thus cost.

Information of the Public

AFBS welcomes increased transparency, provided it is helpful for the supervised entities and contributes to market integrity and intelligibility in the supervisory procedure. Prior to increasing FINMA's powers in that realm there should, however, be an assessment ascertaining that the means already available for FINMA have been fully exploited and did prove not being sufficient for the goals to be achieved. AFBS rejects increased transparency where it introduces measures that potentially lead to unequal playing field that potentially lead to legal insecurity and impact financial market stability. It must in effect be borne in mind that excessive publicity in an environment whose stability strongly depends on reputation, excessive transparency can lead to the contrary effect and introduce additional insecurity and tension. Information of the public must not serve as a tool for enforcing application of supervisory decisions.

AFBS opposes transparency * on final rulings prior to their entry into force; * on ongoing investigations, procedures, and measures; * on public information for purposes of enforcement of supervisory measures. It supports confidentiality standards by assuring confidentiality for both private and legal persons involved and the publication of non-action letters in anonymised form. The latter point should contribute to offer clarity on supervisory practice in the realm of new financial market segments such as DLT and FinTech.

AFBS Position: Transparency on procedures before final entry into force, on ongoing procedures shall be avoided. Public information must not be a tool for supervisory action. Confidentiality must be preserved to assure consistency and preserve effectiveness of supervisory action. However, agreements with individual entities that may be of interest to the market shall be made public to contribute emergence of standard market practice.

Information and Reporting Duties

There is no reason for extending reporting duties beyond the existing organs. The internal organisation of each institution governs the way in which supervisory obligations are complied with, responsibility for such compliance lies with the supreme organs (board and management) and there is no need for extending it to other levels of competence. The higher the number of entities involved in the reporting mechanism, the more complex the mechanism becomes both for the supervised entity and the supervisor. Reporting at level of the institute suffices; each institute shall be in charge of appropriate internal organisation to assure compliance.

Therefore, neither shall reporting duties be extended to employees subject to the regime of fitness and propriety, nor shall information duties be extended to all employees.

AFBS Position: Existing reporting duties are sufficient for the assurance of consistent, coherent, continued exchange between supervised entity and FINMA. Introducing additional players does not increase information but merely noise and complexity.

Sanction Regime

AFBS is opposed to extending sanction competence regarding measures in the fields of prohibition of exercising the profession, prohibition of exercising certain activities, and confiscation of profits.
Means for sanctioning non-compliant business conduct and for punishing persons in charge of such behaviour have already been available in the existing legislation. There is no clear reason for extending scope of existing means of sanctioning and for introducing new ones, especially as there is no evidence that the existing means would not have been sufficient.

AFBS Position: Expansion of means of sanctioning is not adequate and shall be avoided.

Auditing

AFBS rejects Art 23 draft Bank Act authorising FINMA to initiate direct audits at any time and without any explanation or requirement. The freedom to initiate such action gives excessive power to FINMA. The regulation also potentially leads to confusion of powers between the external audit company and the FINMA, whose role is to perform direct inspections in case of need of in-depth assessments. If FINMA were to intervene at any time and without specific

explanation, such distribution of competencies between external audit company and FINMA would no longer be given.

There is risk of audit cost increasing excessively, and this would – once again – particularly impact small and medium-sized banks and make their compliance with supervisory requirements ever more expensive.

Cost of audit activity is potentially also increased unnecessarily through the obligation of rotating audit company in regular intervals. It is questionable whether such an obligation is effective from an independence point of view. It is certain that it leads to an increase of cost as new teams need to be trained and get acquainted to the specific situation. There is no evidence that the existing system did not suffice the purpose.
If the rotation obligation were to be upheld, it should be aligned with international standards to make sure banks with international exposure, such as Swiss affiliates of foreign banks, can align with their group company.

AFBS Position: Amendments to FINMA competencies regarding on-site inspections and ad hoc supervisory procedures are to be rejected. The measure would introduce confusion of competence, excessive complexity, but no certain added value in comparison to the existing setup. Obligation to rotate audit company in addition to rotating lead auditor must be avoided for the same reasons; if it were to be introduced, intervals should be aligned with international practice.