

Organization of the Federal Administration

FINMA's independence undermined by Federal Council supervision ?

Par Teymour Brander le 29 March 2022

At its meeting of March 11, 2022, the Federal Council approved a revision of the Ordinance on the Organization of Government and Administration (OLOGA). A new art. 24a OLOGA has been adopted to specify the Federal Council's tasks in terms of "supervision and control" ("Aufsicht und Steuerung") of the federal administration's autonomous entities ("Verselbstständigte Einheiten").

Could this revision – which comes into force on July 1, 2022 – undermine FINMA's independence ?

The current framework governing the supervision of entities made autonomous by the Federal Council is essentially as follows. Under art. 8 para. 4 LOGA, the Federal Council is required to supervise ("beaufsichtigen") decentralized administrative units. Art. 8 para. 5 LOGA allows the Federal Council to set the strategic objectives of the entities concerned. Significantly, art. 24 para. 3 OLOGA refers to special legislation for the purpose, scope and principles of such supervision. It depends above all on the degree of autonomy of the body in question.

Limited importance will be attached to the legal terminology used, implying that the autonomy of the entities concerned only came about after their creation ("became autonomous"). The entity discussed in this contribution – FINMA – has in fact been decentralized and autonomous since its creation, as we shall see below.

Let's return to the adopted revision. The new art. 24a OLOGA can be broken down as follows :

Para. 1 recalls the overall responsibility of the Federal Council for the autonomous entities. Paragraphs 2 to 4 govern the distribution of powers and tasks between and within the departments.

Finally, para. 5 entrusts the Federal Finance Administration (FFA) with the elaboration and development of the basis for the supervision and management of the autonomous entities. The legal text refers to the concept of "public corporate governance" in German.

According to the FFA's commentary, Art. 24a OLOGA was adopted in order to "regulate the division of tasks between the competent departments and the FFA", and "largely reflects current practice" (cf. Commentary 24a OLOGA, §1.1, p. 2). With regard to the elaboration and development of the basis for supervision and management by the FFA, the commentary states

that the related art. 24a para. 5 OLOGA “provides [...] a legal basis for the current situation” and would therefore not create any new tasks for the FFA (cf. Commentary 24a OLOGA, §2.6, p. 8). In other words, the adopted revision would not extend the Federal Council’s powers to supervise and steer autonomous entities.

The revision also includes a new Appendix 3. This takes over the list of autonomous entities in Appendix 1 of the OLOGA, and adds the following new information : (i) an indication of the administrative unit responsible within the department, and (ii) the entities for which joint supervision with the FFA is planned.

What are the implications for FINMA supervision ? As set out in appendices 1 and 3 of the OLOGA, FINMA is a decentralized and autonomous entity. It is therefore subject to supervision by the Federal Council. However, FINMA has operated autonomously and independently since its creation – a principle enshrined in art. 21 para. 1 FINMASA. The creation of this authority as an autonomous public-law institution (art. 5 para. 1 FINMASA) was intended to ensure precisely this objective (cf. FF 2006 2741, para. 1.2.3). Indeed, the above-mentioned message from the Federal Council stresses that “[i]n order to carry out its legal obligations in an appropriate manner, the Financial Market Supervisory Authority must enjoy functional autonomy vis-à-vis the political authorities” (cf. FF 2006 2741, para. 1.2.2).

In our view, the interpretation of art. 24a para. 5 OLOGA, which entrusts the FFA with the task of drawing up the “basis for supervision and management” of autonomous entities – and therefore a priori also of FINMA – should be based on art. 24a para. 3 OLOGA, which reserves the right to special legislation, on the one hand, and on the principle of the hierarchy of norms, on the other. The Ordinance on the Financial Market Supervision Act confirms this, whether in the process of approving FINMA’s strategic objectives (art. 14 OFINMA) or in the consultation and coordination involved in the authority’s international activities (art. 3 and 4 OFINMA). These developments, reinforced by the AFF’s explanations, should consequently support an implementation of the OLOGA revision that respects FINMA’s independence.

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