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The powers of FINMA

An old sea serpent

Par Olivier Hari le 27 April 2023

In 2004 (second partial report of the Commission of Experts, “Sanctions in financial market supervision”), when FINMASA was adopted, and again in December 2014 (FINMA and its regulatory and supervisory activities, report of the Federal Council in response to various postulates), it was decided not to give FINMA the power to impose fines. The Federal Council (report, p. 42) explained its position as follows : “The Federal Council also concludes that FINMA should not be granted the right to impose fines. If it had this power, FINMA would have to observe the guarantees of criminal procedure […]. This would require a thorough review of its organization”.

In February 2022, there was a slight change of direction : in response to postulate 21.4628 (not yet dealt with by the Council), the Federal Council stated : (…) “it might be appropriate to give this matter further consideration”. In proposing that the postulate be rejected, it points out that 82 enforcement decisions and 140 criminal denunciations have been issued by FINMA, proof in its view that the existing framework is sufficient. On April 11, 2023, during the special session of Parliament dedicated to the rescue of Credit Suisse, a point of order was tabled, proposing to discuss postulate 21.4628. The motion was rejected.

What does this chronology show ?

That some good questions were asked by our parliamentarians.

That some analyses have been carried out in relation to the effectiveness of monitoring tools, but that they remain incomplete, and therefore that the Federal Council’s repeated responses on the subject are not entirely satisfactory. We certainly cannot refuse to grant FINMA a tool – the power to impose fines – on the grounds that it would be costly to implement. Moreover, isn’t it likely to pay off – which is not the objective, but further weakens the argument ? It could have been rejected on grounds of efficiency and criminal policy, but no analysis of the effectiveness of this sanction seems to have been carried out, or at least not published.

The simple fact that FINMA must itself report – like any other private individual – to a third-party authority (art. 50 FINMASA) the criminally relevant facts it discovers in the course of its supervision shows, in our view, the ineffectiveness of the relevant legislative framework.

However, to evaluate FINMA solely in terms of its power to impose fines is irrelevant, if not excessively simplistic. By definition, sanctions are imposed after potentially reprehensible acts

have been committed, and sometimes the damage – not only economic but also reputational – is irreparable. Moreover, linking the Credit Suisse debacle to a repressive tool such as a fine is not necessarily the most pertinent.

The central question, which goes far beyond the granting of the power to amend, is posed in different terms and relates to the general power of FINMA, both in its enforcement and – above all – its supervisory activities.

However, an assessment of FINMA and its powers does exist, which has been little cited and could usefully feed into the current and future debate : that carried out by the International Monetary Fund in 2019, which drew up a number of findings and made a number of recommendations. In its report, supplemented by a series of technical notes, it provided analysis and recommendations in several areas (pp. 32ff) :

FINMA's autonomy and governance (§ 32 and 34 in particular) : According to the IMF, the legislator should continue to strengthen FINMA's autonomy, governance and accountability. Emphasizing that FINMA's staff resources must be commensurate with the scope of its mandate and the size of the Swiss financial system, the IMF reiterated that FINMA's powers to legislate by means of binding prudential ordinances and to codify supervisory practice by means of circulars must not be weakened. It also recommended that FINMA's flexibility and autonomy should not be sacrificed through excessively dilutive public consultations.

Bank supervision (§38 and 39 in particular) : In the IMF's view, FINMA should itself carry out more risk-oriented on-site inspections, while improving the efficiency of the prudential audit system. Prudential audits should focus on key areas, with audits resulting in positive audit opinions rather than critical reviews. The IMF also highlighted the risk of conflicts of interest when external auditors are remunerated by the regulator. The IMF also pointed to a major weakness in risk management and control : the absence of in-depth assessment of bank boards and management, for lack of a legal basis. The IMF also recommended that FINMA make more active use of its existing enforcement tools, and disclose more fully individual enforcement measures and license withdrawals.

Now that the debate on FINMA's powers has been (re)launched, it is particularly in the light of this assessment, necessarily weighted in view of certain legislative developments that have taken place in the meantime, that the question should be examined.

Given what is at stake, it seems reasonable to consider that the Federal Council should listen to Parliament's legitimate questions. With a little ambition, there is a chance to turn recent events into an opportunity to strengthen the financial center and FINMA, if necessary by taking strong decisions. After all, FINMA, which came into being in 2009, is not as old as all that, and its teething problems can still be corrected if we give ourselves the means to do so.

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