

Too big to fail

A senior managers regime gaining ground in Switzerland

Par Besart Buci le 15 May 2024

In its report of 10 April 2024 on bank stability, the Federal Council proposes the development of a senior managers' regime (SMR) as part of the "Too Big To Fail" (TBTF) framework. An SMR assigns specific responsibilities to the most senior managers and makes it easier for the supervisory authorities to identify those at fault.

This commentary focuses on one of the 37 measures analysed by the Federal Council in its report (for a general commentary on the report, see Bahar, cdbl.ch/1343/).

In its review, the Federal Council contextualises the measure envisaged in Switzerland by situating it in relation to the approaches of foreign jurisdictions, in particular the United Kingdom (with its Senior Managers and Certification Regime), Ireland (with its Individual Accountability Framework) and Hong Kong (with its Managers-In-Charge Regime). It reviews the main features of these approaches, including the personal scope of the various accountability regimes, the approval of the appointment of senior managers by the supervisory authority, and the allocation of responsibilities. The Federal Council also points out that the United States (whose authorities already have considerable powers in this area at federal and state level) and the European Union do not have such a system.

The Federal Council goes on to briefly assess the current TBTF system and notes that Switzerland does not have a prudential instrument equivalent to the SMR. It therefore proposes to introduce a liability regime in law as an explicit organisational requirement, with the aim of guaranteeing the precise allocation of responsibilities to specific individuals, in particular to those at the highest levels of management.

In principle, this system would be introduced for banking institutions, more specifically for systemically important banks and, possibly, for other financial players. It would apply to senior executives (members of the Board of Directors and senior management). Persons subordinate to management could also be included in the circle of persons subject to the law, given the broad decision-making powers that some of them may have.

In addition to a clear definition of responsibilities, the Federal Council points out that such a system implies an obligation for the persons concerned to assume them. It cites as an example the obligation of managers to prevent inappropriate behaviour in the areas of responsibility assigned to them. This assignment must also be documented so that the establishments are in a position to identify the person concerned and sanction him or her if necessary. The Federal

Council stresses that effective implementation of an SMR requires the creation of appropriate incentives, in the sense that a person must expect, in the event of a breach of his or her obligations, to be sanctioned either by the institution itself (such as a reduction in variable remuneration) or by the supervisory authority (such as a ban on practising). It adds that this sanction mechanism is intended to make individuals more accountable.

The Federal Council concludes its review of the proposal by listing a number of open questions :

- Should the application of this regime be limited to Swiss territory or should it be extended to other places where the bank operates ?
- How should the rules for institutions be defined according to their size and risks ?
- What do institutions need to document in relation to the allocation of responsibilities ?
- What impact is this regime likely to have on the concept of liability in private and criminal law ?

These are all questions that will have to be addressed by Parliament when it draws up this regime, in addition to those that may emerge from the work of the Parliamentary Committee of Inquiry “Management by the authorities – emergency merger of Credit Suisse”, expected at the end of 2024.

This proposal by the Federal Council has probably not failed to delight certain circles. The idea of an SMR is not new in Switzerland. For several years now, politicians (postulate to Parliament dated 18 June 2021 ; motions to Parliament dated 11 April 2023 and 9 November 2023) and FINMA (in April and December 2023) have been considering a system of individual liability for directors. FINMA is in favour of introducing an SMR in Switzerland in order to strengthen bank governance and ensure a clear division of responsibilities.

Moreover, the implementation of this measure is in line with what the Financial Stability Board (FSB) recommended in its peer review report on Switzerland dated 29 February 2024 (for a commentary on the report, see Buci, cdbf.ch/1332/). The FSB recommended that Switzerland introduce an SMR to make it easier to take action against executives who fail to meet their obligations. In 2018, the FSB also made a general call for financial institutions to improve the allocation of individual responsibilities and for supervisory authorities to enforce this allocation.

If the introduction of an SMR becomes a reality, Switzerland will not be a forerunner in this area, but will be able to benefit from feedback from other countries, in particular the United Kingdom, which has seen a positive change in the behaviour of managers since the introduction of its SMR in March 2016. On the other hand, this legislative delay has deprived our country of the opportunity to benefit from such a scheme to address Credit Suisse’s corporate culture issues. One wonders whether an SMR could have prevented Credit Suisse’s collapse, or at least mitigated its shortcomings. I guess we will never know.