CENTRE DE DROIT
BANCAIRE ET FINANCIER

AT1

The Federal Administrative Court rules that depreciation is contrary to the law

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In its ruling B-2334/2023 of October 1, 2025, the FAC issued a partial decision overturning FINMA's decision of March 19, 2023, ordering the write-down of hybrid loans recognized as additional tier 1 (AT1) capital. This is an important step in what promises to be a long legal saga.

This commentary is an exception to the usual practice regarding the length of the text, given the importance and scope of the judgment. This decision will also be discussed at the 2025 Banking and Finance Law Day.

I. Facts

As part of the measures to prevent the collapse of Credit Suisse, FINMA ordered the bank to write down its AT1 capital instruments, which it did. Some 3,000 interested parties appealed against this decision, resulting in 360 proceedings before the Federal Administrative Court.

The proceedings in question concern the appeal by three investors who sought, primarily, the annulment of FINMA's decision and the restoration of the situation prevailing prior to the write-down of the loans, arguing that the write-down was not based on either a contractual or a legal basis. FINMA and UBS contested the appellants' standing to appeal and, on the merits, argued that the contractual conditions had been met and that FINMA's decision was based on Art. 26 LB, Art. 31 LFINMA, and Art. 5*a* of the Federal Council's Emergency Ordinance of March 16, 2023 (Ordinance).

II. Summary of the judgment

a. Lack of contractual basis

After admitting the right to appeal following a detailed 17-page analysis based in particular on Art. 29*a* of the Constitution and Art. 6 of the ECHR (consideration 3), the FAC examined, as a preliminary matter, whether the amortization was based on a contractual basis : after recalling the legal nature of these hybrid instruments, which, with the agreement of FINMA, can be counted as regulatory capital in addition to core capital (CET1) and, if necessary, amortized to absorb losses and strengthen capital, the TAF interpreted the terms of the loan as any other contractual instrument (consideration 5.3.4), disregarding their economic purpose or regulatory

basis in the OFR (consideration 5.4.4).

On this basis, it concludes that these capital instruments do not contribute to improving the liquidity of their issuer, but only their capital. As a result, the FAC first considers that Credit Suisse did not receive state aid to improve its capital for the purposes of clause 7(a) (iii) (B) (consideration 5.4) and, secondly, that a write-down of the AT1 and other capital instruments was not necessary to prevent Credit Suisse from becoming bankrupt or insolvent for the purposes of clause 7 (a) (iii) (A), which precludes FINMA from requesting write-downs on the basis of the terms of the loan (consideration 5.5).

In support of this conclusion, the FAC notes that Credit Suisse, in an email sent on March 19, 2023, at 4:24 p.m., stated that the terms of the loan did not allow for amortization (consideration 5.4.1). . Furthermore, the court considers that these instruments serve to replenish equity capital rather than address liquidity problems and, therefore, must be triggered by a need for equity capital and respond to that need (consideration 5.4.2 and 5.4.3).

However, the FAC considered that FINMA did not order the amortization of the loans on the grounds of non-compliance with capital requirements (consideration 5.4.5.6), since the bank still met the regulatory capital requirements during the famous weekend, as confirmed by the Federal Council in its Message of March 29, 2023, concerning the supplement to the 2023 budget and in the Report of the CEP (consideration 5.4.5.7).

Furthermore, according to the FAC, the provision of liquidity, including through ELA+ (Art. 3 Ordinance) and PLB (Art. 4 Ordinance) a few days earlier (consideration 5.4.5.8), as well as the guarantee against losses based on Art. 14*a* of the Ordinance in favor of UBS to enable the merger (consideration 5.4.6) were not necessary to replenish Credit Suisse's capital, but were intended to enable the dual-purpose bank to overcome the massive outflows of liquidity and to facilitate the takeover by UBS.

As a result, invoking the principle of trust and the interpretation *contra stipulatorem,* the FAC interprets clause 7(a)(iii)(B) narrowly and considers that the terms of the loan cannot justify a write-down that is not caused by a need for capital or intended to address a problem of this nature. For the same reason, it also ruled out interpreting the clause as allowing the issuer to be saved from imminent insolvency caused by the impossibility of continuing its business (consideration 5.4.7), before extending the same reasoning to the application of clause 7 (a) (iii) (A) to exclude it further, because not all hybrid instruments intended for *going concern* have been amortized.

b. Lack of sufficient and valid legal basis

After ruling out a contractual basis for amortization, the FAC examines the existence of a sufficient legal basis (consideration 6). With reference to ATF 137 II 431 (consideration 2.2.2), it considers that Art. 26 LB on protective measures cannot be applied because the amortization of AT1s primarily and directly affects bond creditors (consideration 6.8). For the same fundamental reason, it also excludes the application of the measure under Art. 31 FINMASA (consideration 6.9). It therefore turns its attention to Art. 5*a* of the Ordinance. However, the wording of this provision does not convince the FAC : it criticizes it first of all because it does not define sufficiently precisely the conditions under which a write-down must take place (consideration 6.10.4).

c. Constitutionality of Art. 5*a* of the Ordinance

The FAC then challenges the constitutionality of the provision itself in light of Art. 184 para. 3 and 185 para. 3 of the Constitution. First, it challenges it on the grounds that the merger between UBS and Credit Suisse, to quote Federal Councilor Keller-Suter at the press conference on March 19, 2023, was a commercial transaction and, as such, did not justify the adoption of the Ordinance (considerations 7.6.1 and 7.6.2).

Second, citing the same grounds as in ATF 137 II 431, consid. 3.2.1, it considers that, in view of Art. 178 para. 3 of the Constitution, that the Federal Council cannot delegate its power to act on the basis of the necessity clauses in Art. 184 para. 3 and Art. 185 para. 3 of the Constitution, but must instead decide for itself whether the conditions for intervention are met (considerations 7.7, 7.8, and 7.9). However, it acknowledges that there was no delegation to Credit Suisse and that the bank merely acted as an administrative assistant (Verwaltungshelfer) (consideration 7.9.4) and is therefore not subject to the same principles.

The FAC continues its analysis by considering that the decision corresponds to a formal expropriation and is not compatible with the guarantee of property rights in the absence of full compensation (consideration 7.10).

Finally, it concludes its analysis by questioning FINMA's application of Art. 5*a* of the Ordinance, based on the distinction made in Art. 28 FCA between approval by the Finance Delegation and subsequent approval by the Federal Assembly, without ruling on the issue (consideration 9.2).

As a result, the FAC concludes that FINMA's decision has no legal or contractual basis. It thus avoids ruling on the question of whether the priority of creditors over equity capital, a sacrosanct principle of bankruptcy law, including in the banking sector, also applies prior to a bank restructuring or insolvency procedure.

III. Commentary

a. A simple liquidity crisis or a symptom of a loss of confidence that makes an injection of equity capital essential ?

The decision has already been the subject of much discussion. However, there is still a great deal of uncertainty. FINMA has already announced that it will file a public law appeal with the Federal Supreme Court, and we can expect our highest court to give its own opinion, particularly on the constitutional issue of the degree of precision required in the legal basis to justify the write-down of AT1 instruments and the delegation to FINMA of the power to order the write-down with the approval of credits under the PLB.

Taking a step back, the ruling is based on two strong arguments : first, AT1s are capital instruments, and in the face of a liquidity crisis, capital is not what is needed. Second, in the absence of a legal basis, emergency powers may be invoked to deal with a crisis, but it is then up to the Federal Council to intervene and determine the course of action.

However, this approach is not immune to criticism. Ultimately, the FAC's decision can be understood within a formalistic view in which the write-down of AT1s and Art. 5*a* of the Ordinance are considered in isolation from the circumstances that prevailed during the weekend

of March 18-19, 2023, and the package of measures deployed at that time.

Admittedly, formally speaking, the regulatory capital requirements were met until the takeover was announced. However, focusing on Credit Suisse's capitalization on March 19, 2023 ignores the downward spiral in which the bank found itself at that time : Credit Suisse was facing not only a liquidity crisis, but more fundamentally a crisis of confidence. The market feared that, in the near future, other unpleasant surprises would weaken the bank and, as a result, lost confidence in it. The impact on liquidity was immediate, but the crisis also affected equity capital, as depositors withdrew their assets for fear of not being repaid and safe and liquid assets declined. As a result, the crisis of confidence would sooner or later have an impact on equity capital unless the bank was able to turn things around, and the market was no longer willing to give it the time it needed to do so.

In fact, according to the authorities' assessment, Credit Suisse would not have been able to survive the fateful weekend without a massive injection of capital to restore confidence. As a result, Credit Suisse was already doomed at that point, as it could not raise the capital on its own. It was clear that the bank could not continue operating as it was : it would either be nationalized and partially liquidated, taken over by another bank with state aid to enable the transaction to go ahead, or liquidated in accordance with the emergency plan, with systemically important activities being maintained. In other words, even if Credit Suisse met the regulatory requirements, the bank no longer had enough capital to convince the market to let it continue its activities. In the solution that was chosen, the capital injection came through a merger with UBS, which made the capital of the country's largest bank available to support Credit Suisse's activities and finance its restructuring.

However, contrary to the Federal Administrative Court's ruling, it is difficult to take Federal Councilor Karin Keller-Sutter's words at face value : this operation was only a commercial solution in appearance. It still took a safety cushion of CHF 25 billion, in the form of a CHF 9 billion guarantee and the amortization of AT1s amounting to CHF 16 billion, to make the terms of the merger commercially acceptable to the UBS board of directors. However, this safety net benefited not only UBS but also, indirectly, Credit Suisse and its creditors, who knew that UBS's balance sheet and the Swiss government's guarantee would ultimately be there to cover any losses. It helped convince the market that, once merged with UBS, the bank would have enough capital to weather any other unpleasant surprises. In other words, without the AT1 write-down, either the merger would not have gone ahead or the Swiss government would have had to increase the amount of the guarantee to enable the merged entity to absorb certain Credit Suisse losses.

Moreover, the realistic alternative to the merger, the temporary nationalization of Credit Suisse, would have required the write-down of AT1s in order to maintain systemically important activities and absorb the losses associated with the liquidation of other activities.

Admittedly, the FAC explains its restrictive interpretation on the grounds that bondholders did not negotiate the terms of the loan and treats these instruments as standard form contracts, thereby failing to take into account the origin of bonds on the capital markets : the terms of the loan are not dictated by the issuer but negotiated with the investment banks that underwrite the securities before placing them and, as a result, ensure that the interests of investors are taken into account, so that the result is much more balanced than general terms and conditions.

Ultimately, the Federal Supreme Court will have to consider whether, subjectively and according to the principle of trust, AT1 bondholders did not expect their bonds to be written down in such scenarios. In fact, there was no surprise : the price of AT1s on the eve of the weekend of March 18/19, 2023 reflected the risk of write-down. If there was a surprise, it resulted not from the principle of write-down, but from the fact that Credit Suisse shareholders benefited – at least in relative terms – from the merger, while AT1 bondholders saw their investments written down in full.

b. What are the limits to the Federal Council's power to invoke emergency powers ?

The FAC's formalistic approach is also reflected in its examination of Art. 5*a* of the Ordinance. There is no doubt that this provision, taken literally, gives FINMA broad discretionary powers. However, it must be viewed in the context of the Ordinance as a whole. In this respect, the present case differs from that of ATF 137 II 431, where the Federal Council remained passive and did not adopt any ordinance or decision, but knowingly allowed FINMA to intervene to save UBS in its conflict with the US authorities and preserve the country's financial stability. In the Credit Suisse situation, on the contrary, the Federal Council explicitly assumed its constitutional and political responsibilities under Articles 184(3) and 185(3) of the Constitution and determined that it was necessary to act by means of an ordinance.

In adopting the Ordinance, the Federal Council assessed, in accordance with the financial market supervisory system established by the FINMA Act and the Banking Act, that it was up to FINMA to decide whether, in this particular case, it was necessary, appropriate, and proportionate to write down the AT1 in the event of recourse to the PLB, since that authority, which was more familiar with the intricacies of Credit Suisse's financial situation, was more competent to apply the standard. Thus, the provision sets out the broad outlines of its application : write-downs may be ordered when a default risk guarantee is approved. Furthermore, it is implicitly based on the fact that FINMA is not free in the exercise of its discretionary power : it must ensure that its actions are in line with the objectives of the FINMA Act and comply with the principles of administrative law, in particular the principle of proportionality.

In other words, the Federal Council did not delegate the power to adopt emergency legislation, but merely reproduced the normally applicable regime in the context of the Ordinance. Therefore, by considering that it is not permissible to confer discretionary power on an independent authority belonging to the decentralized administration, the FAC is imposing a new requirement that does not result from the text of the Federal Constitution or from the case law on which it is based. However, this conclusion is not self-evident, especially since, apart from the emergency law, it is this authority that has the power to decide to order the write-down of AT1s. Thus, if the Federal Council had assumed this power, this choice would probably have been criticized on the grounds that it would have assumed a power that the law normally confers on FINMA. This issue is therefore controversial and will have to be decided by the Federal Supreme Court.

c. What are the consequences of the annulment of FINMA's decision ?

Finally, the FAC's decision is only a partial decision. It deliberately leaves part of the proceedings open : it does not rule on the question of the effect of the annulment of FINMA's decision. The appellants are asking the court to order FINMA to place them in the position they

would have been in if the amortization had not taken place (consideration C.b.). Without addressing the question of whether an appeal can have such an effect that goes beyond reform or cassation, it is not clear that the FAC, FINMA or, for that matter, UBS can revive the amortized loans.

This raises the question of another remedy in the proceedings before the FAC or in new proceedings : liability or unjust enrichment. Liability on the part of UBS seems difficult to establish, since it acted without fault on the basis of an enforceable decision. If unjust enrichment is invoked, the question arises as to whether UBS was enriched without cause : UBS – as the successor to Credit Suisse – was certainly released from these loans. Nevertheless, it will argue that this advantage was reflected in the terms of the merger and that if the loans were to be revived, its balance sheet as the acquiring party would be burdened with this liability.

Thus, the question may have to be decided with regard to the liability of FINMA and/or the Swiss Confederation. However, the appropriate procedure is not to appeal against the decision to the Federal Administrative Court, but to follow the channels defined by the LRCF. Furthermore, without anticipating the substantive debate, it should be noted that the amount of damages will not necessarily correspond to the nominal amount of the amortized AT1s, which before the fateful weekend were trading at around 30 % of their nominal value. However, this price does not necessarily reflect the value of the AT1s, since the market was already speculating on various possibilities, including a takeover by a buyer. Thus, it is not impossible to conclude that the instruments would have been worthless at the end of the weekend if the merger had not gone through.

IV. Conclusion

In conclusion, the FAC's decision should be welcomed because it provides proof of the independence of the judicial system. However, the battle is not yet won. The Federal Supreme Court could overturn the decision, either on the question of the interpretation of the terms of the loan or on the validity of the legal basis. Even if the decision is upheld, the question of its practical consequences will probably remain open for several years. At this stage, and with the benefit of hindsight, this case highlights the difficulties of intervening in an emergency, and if there is one lesson to be learned from this ruling, it is that the legal framework needs to be strengthened and clarified in order to avoid future controversies. However, it is difficult to predict all future crises, so the issues raised by this ruling will remain relevant.

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