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Independence does not equate to absence of control

Ladies and gentlemen

FINMA is an independent supervisory authority – and rightly so. Independence allows it to act objectively and free from other constraints. It is central to effective and credible supervision, which benefits both financial market clients and the stability of the financial system.

From time to time, articles appear in the press claiming that FINMA is regulating excessively or on its own initiative, and thereby going beyond its statutory mandate: in short, that it has become too powerful. So the question is: who controls the controller – who, in other words, supervises FINMA? I want to explain today just how far FINMA's work is integrated into the structures of the state. I will argue that independence does not mean absence of control, either in FINMA's main activity of supervision or in the secondary task of regulation, which it is empowered and mandated by law to perform.

FINMA does indeed act independently as a supervisory authority. Neither Parliament nor the Federal Council has the right to tell FINMA how to supervise financial institutions and the markets. There are very good constitutional reasons for this. In its capacity as a law-enforcing authority, FINMA can be compared to a court of first instance. No one would dispute that an institution in its position must be able to take decisions independently, in each case, free from unrelated considerations. Logically, the same must apply when FINMA sets out its practice in circulars, creating the foundation for uniform application of the law in all future cases. That is why FINMA is independent.

Of course, FINMA has a degree of discretion in how it operates. In many areas, the legislation is based on principles. It leaves the task of technical implementation in practice up to FINMA and gives it a degree of technical flexibility in doing so. FINMA abides by the principles of administrative law, which include proportionality, equality before the law, and the prohibition of arbitrary conduct. So “independence” is in no way synonymous with “absence of control”. Allow me to explain the three levels of control.

The Board of Directors has a control function

FINMA's Board of Directors has a wide range of responsibilities, of which monitoring the Executive Board is a central element. The Board of Directors, of which I am the full-time Chair, also takes decisions on FINMA's budget and strategic course: important decisions that dictate FINMA's future direction. The Board of Directors is fully answerable for all the key decisions FINMA has to take, from the realignment of auditing to the regime for small banks and a strong SST. My fellow directors and I are therefore the first important control body overseeing FINMA's actions.

That is especially true when it comes to regulation, one of the Board's most crucial tasks. FINMA only regulates at the secondary level. The bulk of financial market regulation is set down in principle-based laws or ordinances of the Federal Council. As the technical authority, we publish circulars setting out how we interpret the discretion the law allows us, how we define the details of our supervisory practice, and how we expect supervised institutions to implement the legislation. This makes FINMA's actions transparent, predictable and even-handed for all concerned. Our philosophy is clear: the Board of Directors favours strict prudential rules, and in particular solidly capitalised institutions. FINMA is therefore adamantly opposed to watering down the insurance solvency regime and with it the protection afforded to policyholders. In areas other than capital requirements, however, FINMA adopts a liberal approach. We are open to innovation: FINMA has removed unnecessary obstacles from its regulatory process and issued a circular facilitating online and video client identification – a move that has been welcomed by the sector as a whole. We also attach great importance to proportionality. We believe the intensity of supervision and regulation should match a company's size and the risks in its business model.

As a Board of Directors, we are unreservedly committed to a principle-based, proportional and differentiated approach. We are very much aware of the impact of our work and the decisions we take. We have the necessary expertise and have put in place a robust process in which exchange with the sector plays a major role.

FINMA is appropriately integrated into the structures of the state

But the Board of Directors is not the only body overseeing FINMA's actions. Institutionally, FINMA is also appropriately integrated into the structures of the constitutional state. A range of processes and instances act as a counterweight to its independence. Parliament and the Federal Council have the most extensive say, via the legislative process. They decide not only on principles but also on the level of detail to be contained in laws and ordinances, and with it the extent of FINMA's discretion. These political bodies can thus steer and influence FINMA's scope of action through legislative amendments.

The Federal Council has further specific instruments for guiding FINMA. It approves FINMA's strategic goals, which are defined every four years and reflect the strategic course chosen by the Board of Directors and the main areas of the authority's activities. The Federal Council also appoints the Chair and members of the Board of Directors and approves the appointment of the CEO.

Moreover, FINMA is subject to scrutiny by Parliament, in the form of the Control Committee of the Council of States. FINMA has reported to the Committee on its method of operation, approach and activities on a number of occasions. There is an institutionalised annual exchange meeting at which specific issues related to supervision are also discussed; these have included the HSBC case and

LIBOR. Parliamentary scrutiny focuses on whether FINMA is functioning correctly as an authority and deploying its resources in accordance with its mandate. Last but not least, the Swiss Federal Audit Office examines FINMA's accounts and use of its financial resources. So as you can see, there are already a number of ways in which politicians can influence FINMA to ensure that independence does not translate into excessive power.

FINMA's decisions can be reviewed by the courts

As I explained earlier, FINMA acts as the first-instance enforcer of financial market law. How can it be prevented from exceeding its powers, going beyond the law and taking arbitrary decisions? Again, an effective control mechanism is in place. Every decision taken by FINMA in an individual case can be contested in the courts. This is the third level of control, and it means there is constitutional and judicial oversight of the authority's decisions, ensuring that we exercise our discretion within reasonable bounds.

The courts' decisions create vital clarity in the application of the law. The enforcement of supervisory law is not a black and white matter because, as I have mentioned, the rules are often principle-based and have to be interpreted. The courts have the final say. Their decisions provide the necessary guidance on the future interpretation of the law. They have an important role to play, and as a supervisory authority we are grateful for the clarity their decisions create.

Those affected by FINMA's decisions routinely refer them to the Federal Administrative Court and even the Federal Supreme Court. They have every right to do so; this is a normal procedure in a constitutional state. That said, the figures on court decisions show that well over 80% do not succeed. Decisions that reverse FINMA's actions are also important and help us to do our job even better.

FINMA's aim is to be an effective supervisor. That means we sometimes have to interpret our discretion broadly. Over recent years, for example, FINMA has taken resolute action against misconduct in various areas of the financial market, and in particular has ruled against individuals directly responsible for serious breaches of supervisory law. Measures that flow from those rulings, such as the industry ban, have only existed since 2009 and FINMA has been using them systematically against serious breaches of supervisory law since 2014. Recently we have noted an increased willingness, mainly by individuals, to contest FINMA rulings in this area. We are convinced, however, that this procedure is an important element of effective supervision and has a preventive effect. This is also set out in our enforcement policy and the strategic goals approved by the Federal Council. The courts help us to calibrate our practice correctly.

This approach, and sometimes the process of exploring our legal options, inevitably increases the risk of court decisions against us. However, review of FINMA's actions by the courts and the occasional defeat for us prove that the controls exist and they work. It is also entirely clear that we must be guided by the courts' decisions. I would only be concerned if FINMA were unwilling or unable to make full use of the instruments at its disposal.

Conclusion

In summary, let me reiterate that the picture of an out-of-control state authority occasionally painted in recent months is not accurate; nor could it be, given the many-layered control mechanisms in place.

There are internal checks and balances. As Chair of this authority I am accountable for them, along with my colleagues on the Board of Directors. But there are also numerous well-functioning and far-reaching external control mechanisms. Parliamentary scrutiny and control by the courts ensure that FINMA is fully subject to the rule of law. FINMA's independence is not an end in itself: it brings clear advantages for the financial centre that could not be achieved differently. A credible supervisory authority provides effective protection for individuals and the system, enabling the financial sector to perform its vital role in the economy without negative consequences for third parties. Those advantages should not be carelessly and unnecessarily put at risk. And before I close, may I reiterate, independence does not mean absence of control.

Thank you.