

FINMA's enforcement toolkit and the debate on fines

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FINMA separates its ongoing supervision from enforcement. Supervision consists of the regular dialogue with the institutions, the review of their reports, the on-site reviews and the work of the audit firms. When this work reveals indications of a serious violation of supervisory law, FINMA can open enforcement proceedings, which are conducted by a separate enforcement division under the Administrative Procedure Act. Its final rulings can be challenged before the Federal Administrative Court and, at the last instance, before the Federal Supreme Court in Lausanne.¹

The instruments available in these proceedings are set out in the Financial Market Supervision Act. FINMA can order an institution to restore compliance with the law and, where a serious violation has occurred, issue a declaratory ruling that records the violation even when compliance can no longer be restored. Such a ruling has no direct financial consequence for the institution. It forms the basis for further measures, however, and is taken into account by FINMA whenever the institution later applies for a licence or seeks approval for a transaction. Against individuals who are responsible for a serious violation, FINMA can impose a ban from acting in a senior position at any supervised institution for up to five years. A separate activity ban can bar employees such as traders or client advisers from their function.²

Three further instruments complete the toolkit. FINMA can confiscate profits that an institution or a person in a senior position has made through a serious violation, with the confiscated amount paid to the Confederation unless it is used to compensate those who suffered the damage. Once a ruling concerning a serious violation has become final, FINMA can publish it, including the personal data of the persons concerned. It can also appoint an independent investigating agent who examines the facts at the institution's expense or implements the measures that FINMA has

ordered.³ The withdrawal of the licence, which ends the existence of the institution as a supervised entity and usually leads to its liquidation, remains the most severe measure.

What FINMA lacks is the power to impose administrative fines on institutions. The Financial Market Supervision Act contains criminal provisions, which punish, among other things, unauthorised activity, the provision of false information to FINMA and the breach of reporting duties. These offences are prosecuted by the Federal Department of Finance under the Federal Act on Administrative Criminal Law, which directs the proceedings primarily against the natural persons responsible. A company can be fined only in narrow circumstances and up to a modest amount.⁴ For a defence lawyer, the interplay of the two procedures raises delicate questions. Information that an institution or an employee has to disclose to FINMA under the duty to cooperate may later reach the criminal prosecutor, although the privilege against self-incrimination protects the accused in criminal proceedings.

The debate on fines intensified after the collapse of Credit Suisse. Its proponents argue that a supervisor without fining power lacks a credible deterrent, since a declaratory ruling has little effect on a large bank whose violations generate substantial profits. They point to the practice of the supervisors in the United Kingdom, the United States and the European Union, which regularly impose fines of considerable size on banks. Its opponents argue that fines are ultimately borne by shareholders who were not responsible for the violation. They also warn that a fining power would draw FINMA's proceedings towards the guarantees of criminal procedure under the European Convention on Human Rights, which would make them longer and more adversarial. The Federal Council included a fining power for FINMA in its proposals for the reform of banking regulation after 2023, as a later section of this chapter describes.⁵

1 Notes

1. On the conduct of FINMA enforcement proceedings under the Federal Act on Administrative Procedure (APA, SR 172.021), the organisational separation of enforcement from supervision within FINMA and the appeal to the Federal Administrative Court and the Federal Supreme Court (Art. 54 FINMASA), see FINMA's enforcement policy and annual reports. To be verified. ↩
2. On the order to restore compliance (Art. 31 FINMASA), the declaratory ruling (Art. 32 FINMASA), the industry ban for persons in senior positions of up to five years (Art. 33 FINMASA) and the activity

- ban for employees (Art. 33a FINMASA), see SR 956.1 and FINMA's enforcement practice. To be verified. ↩
3. On the confiscation of profits (Art. 35 FINMASA), the publication of final rulings in cases of serious violations (Art. 34 FINMASA) and the appointment of investigating agents (Art. 36 FINMASA), see SR 956.1. To be verified. ↩
 4. On the criminal provisions of FINMASA (Art. 44 ff.) and their prosecution by the Federal Department of Finance under the Federal Act on Administrative Criminal Law (ACLA, SR 313.0), including the limited liability of the undertaking under Art. 49 ACLA, see the standard commentaries. To be verified. ↩
 5. On the proposal to grant FINMA the power to impose fines on supervised institutions, contained in the Federal Council's report on banking stability of April 2024 and the subsequent legislative proposals, see the publications of the Federal Department of Finance. Status to be verified. ↩

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