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Kimberley S. Rothwell

Regulation and Supervision of Bank Senior Management in Light of Prudential Corporate Governance

Analysis of the Swiss Framework including Perspectives from British and Dutch Law

UNIVERSITÄT LUZERN

INSTITUT FÜR WIRTSCHAFT UND REGULIERUNG – WiRe

EIZ Publishing

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Dissertation
by the Law Faculty
of the University of Lucerne

to earn the degree of Doctor of Laws

submitted by

Kimberley S. Rothwell
of Niederrohrdorf AG

approved upon the application of

Prof. Dr. Franca Contratto
and
Prof. Dr. Urs Zulauf

Publication of the dissertation approved by the Faculty of Law of the University of Lucerne.

Lucerne, 4 July 2024

The Dean: Prof. Dr. Nicolas Diebold

Author: Kimberley S. Rothwell
Publisher: EIZ Publishing (eizpublishing.ch)
Production, Set & Distribution: buch & netz (buchundnetz.com)
ISBN:
978-3-03805-732-1 (Print – Softcover)
978-3-03805-733-8 (Print – Hardcover)
978-3-03805-734-5 (PDF)
978-3-03805-735-2 (ePub)
DOI: https://doi.org/10.36862/eiz-733
Version: 1.02 – 20240925

The dissertation was submitted by Kimberley S. Rothwell and adopted by the Faculty of Law of the University of Lucerne, represented by Dean Prof. Dr. Nicolas Diebold, on July 4, 2024.
It was supervised by Prof. Dr. Franca Contratto and Prof. Dr. Urs Zulauf.

The open access publication of this book has been published with the support of the Swiss National Science Foundation (SNF).

This work is available in print and various digital formats in **OpenAccess**. Additional information is available at: https://eizpublishing.com/publikationen/regulation-and-supervision-of-bank-senior-management-in-light-of-prudential-corporate-governance/.

Acknowledgements

I would like to express my deepest gratitude to my doctoral mother, Prof Dr. iur. Franca Contratto. Her guidance and encouragement were indispensable. This gratefulness extends to Prof. Dr. iur. Urs Zulauf, who approached the role as co-examiner with remarkable dedication. I consider myself fortunate to have had the freedom to explore my academic interests while benefitting from the crucial and inspiring insights of both examiners during our critical and fruitful discussions throughout this project.

A heartfelt thanks goes to Christophe Reitze, who encouraged me to pursue this path. His constant support, unparalleled patience and unwavering belief in me were the pillars on which this project rested. Our discussions and his thoughtful feedback on parts of the thesis were invaluable. My utmost gratitude is yours.

I am also deeply thankful to my fellow PhD candidates and former colleagues, Janique Bourgeois and Stefanie Fuchs. The uplifting sense of community we shared was a continuous motivator, our lively discourses a source of inspiration and their critical reviews of parts of the manuscript a great help. I would also like to thank Jacqueline Buff for her generous feedback on parts of the work. Her enthusiastic support from the very beginning of this project remained extraordinary and was always deeply appreciated.

I was lucky to be surrounded by even more supporters: my wonderful friends – especially Chantal Siegenthaler, Dana Behrens, Remo Meyer, Laura Grünig and Nadine Grolimund – and my precious family near and far, particularly my mother and brother. They met me with tolerance, kind understanding and patience, all of which were crucial factors that carried me through this endeavour. Ella, Nora, Elias, Mathis, Eliott, Eléonore and Colette, you reminded me of the truly important things in life. I am profoundly grateful for the incredible support I received.

This thesis reflects the state of legislation, jurisprudence, administrative practice and literature as of 31 January 2024 and was completed in February 2024. The views expressed here are entirely my own and have no connection with any past, present or future employment.

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List of Abbreviations

Abs.	Absatz (section)
AER	The American Economic Review
AFM	Autoriteit Financiële Markten (Dutch Authority for the Financial Markets)
AJP	Aktuelle Juristische Praxis
AMLA	Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (SR 955.0)
Annu. Rev. Financ. Econ.	Annual Review of Financial Economics
AOA	Federal Act on the Licensing and Oversight of Auditors of 16 December 2005 (SR 221.302)
AOM	Academy of Management Journal
APA	Federal Act on Administrative Procedure of 20 December 1968 (SR 172.021)
art.	article
BankA	Federal Act on Banks and Savings Banks of 8 November 1934 (SR 952.0)
BankG / BkG	Bankengesetz, see BankA
BankO	Ordinance on Banks and Savings Banks of 30 April 2014 (SR 952.02)
BBl	Bundesblatt (Swiss Federal Gazette)
BCBS	Basel Committee on Banking Supervision
BCG	Boston Consulting Group
BIS	Bank for International Settlements
BoD	Board of Directors
BoE	Bank of England
BSI	Banca della Svizzera Italiana
BSK	Basler Kommentar
CAO	Ordinance on the Capital Adequacy and Risk Diversification of Banks and Securities Firms of 1 June 2012 (SR 952.03)
CapLaw	Swiss Capital Markets Law
CC	Swiss Civil Code of 10 December 1907 (SR 210)

CEO	Chief Executive Officer
cf.	Confer
CFO	Chief Financial Officer
CGIR	Corporate Governance: An International Review (Journal)
Chap.	Chapter
CHF	Swiss Franc
CISA	Federal Act on Collective Investment Schemes of 23 June 2006 (951.31)
cit.	cited as
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), of 30 March 1911 (SR 550)
COB	Compliance Officer Bulletin (Journal)
Comm-FSA	Commentaar Groene Serie Toezicht Financiële Markten (Dutch Commentary)
consid.	considerations (Swiss court decisions)
Cornell Int. Law J.	Cornell International Law Journal
Cornell J. Law Public Policy	Cornell Journal of Law and Public Policy
CRD IV	European Capital Requirements Regulation and Directive, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CRO	Chief Risk Officer
CRR	Capital Requirement Regulation firms
CS	Credit Suisse
DatenVO	FINMA-Datenverordnung, see FINMA-DataO
DBDC	Dutch Banking Disciplinary Committee
Del. J. Corp. Law	Delaware Journal of Corporate Law
Diss.	Dissertation
DNB	De Nederlandsche Bank (Dutch Central Bank)
e.g.	exampli gratia
EBA	European Banking Authority
EBOR	European Business Organization and Law Review

ECB	European Central Bank
ECGI	European Corporate Governance Institute
Econ. J.	The Economic Journal
ed(s).	editor(s)
edn.	Edition
EF	Expert Focus
ESRB	European Systemic Risk Board
et al	et alii
et seq(q).	et sequens
EU	European Union
EUR	Euro
FAC	Federal Administrative Court
FADP	Federal Act on Data Protection of 25 September 2020 (SR 235.1)
FBC	Federal Banking Commission (predecessor of FINMA)
FBEE	Foundation for Banking Ethics Enforcement (The Netherlands)
FCA	Financial Conduct Authority (United Kingdom)
FCD	Federal Court Decision
FCSC	Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101)
FDF	Federal Department of Finance
FI(s)	Financial Institution(s)
FIFA	Fédération Internationale de Football Association
FINMA	Financial Market Supervision Authority
FINMA-AO	Financial Market Audit Ordinance of 5 November 2014 (SR 956.161)
FINMA-DataO	FINMA Ordinance on the Processing of Personal Data in the Course of Supervision of 4 May 2023 (SR 956.124)
FINMAG	Finanzmarktgesetz, see FINMASA
FINMASA	Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (SR 956.1)
FinSA	Federal Act on Financial Services of 15 June 2018 (SR 950.1)
fn	Footnote

ff.	fortfolgende, see et seq.
FoIA	Federal Act on Freedom of Information in the Administration of 17 December 2004 (SR 152.3)
Fordham Law Rev.	Fordham Law Review
FRBNY	Federal Reserve Bank of New York
FS	Festschrift
FSA	Financial Supervision Act of 28 September 2006 (The Netherlands)
FSB	Financial Stability Board
FSC	Federal Supreme Court
FSI	Financial Stability Institute
FSMA	Financial Market and Services Act, Chapter 8 of 15 June 2000 (United Kingdom)
FX	Forex
G20	Group of Twenty
G30	Group of Thirty
GesKR	Zeitschrift für Gesellschafts- und Kapitalmarktrecht
GFC	Global Financial Crisis
(G)-SIB	(Globally) Systemically Important Bank
Habil.	Habilitation
Ibid	Ibidem
IJCB	International *Journal* of Central Banking
IMF	International Monetary Fund
incl.	Including
ISA	Federal Act on the Supervision of Insurance Companies of 17 December 2004 (SR 961.01)
J. Econ. Surv.	Journal of Economic Surveys
J. Finan. Intermedation	Journal of Financial Intermediation
J. Finance	Journal of Finance
JBR	Journal of Banking Regulation
JCL	Journal of Corporation Law
JFE	Journal of Financial Economics

JIBLR	Journal of International Banking Law and Regulation
Komm-BankA	Kommentar Bankengesetz
let.	Letter
LIBOR	London Interbank Offered Rate
LiqO	Ordinance on the Capital Adequacy and Risk Diversification of Banks and Securities Firms of 1 June 2012 (SR 952.03)
lit.	Litera
LL.M.	Legum Magister / Magistra (Master of Laws)
MDB	Malaysia Development Berhad
mio.	Million
Mod. Law Rev.	Modern Law Review
MoM	Management Responsibilities Map
n	note
NL	The Netherlands
no.	number
NVB	Nederlandse Vereniging van Banken (Dutch Banking Association)
NZZ	Neue Zürcher Zeitung
oBankA	old Banking Act, see Banking Act
OECD	Organisation for Economic Cooperation and Development
OR	Obligationenrecht, see CC
Ox. Rev. Econ. Policy	The Oxford Review of Economic Policy
PCBS	Parliamentary Commission on Banking Standards
PDVSA	Petróleos de Venezuela
PRA	Prudential Regulation Authority (United Kingdom)
Rev. Financ. Stud.	The Review of Financial Studies
s(s)	section(s)
Seattle U. Law Rev.	Seattle University Law Review
sec.	Section
SIG	Basel Committee's Supervision and Implementation Group
SIX	Swiss Infrastructure and Exchange
SIX-DCG	SIX Directive on Information relating to Corporate Governance of 29 June 2022

SJZ	Schweizerische Juristen-Zeitung
SK	Schulthess Kommentar
SM&CR	Senior Managers & Certification Regime
SMF	Senior Manager Function
SNB	Swiss National Bank
SoR	Statement of Responsibilities
SS	Supervisory Statement
Theor. Inq. Law	Theoretical Iniquiries in Law
TvC	Tijdschrift voor Compliance (Journal for Compliance)
UK	United Kingdom
USD	United States Dollar
ZSR	Zeitschrift für Schweizerisches Recht

Introduction

I. Relevance of the Topic

Prudential corporate governance of banks has gained particular momentum in the aftermath of the global financial crisis of 2007-2009.[1] It constitutes a *specialised* framework deriving from the well-established economic and legal concept of *general* corporate governance.[2] The objective of prudential corporate governance is to establish structures and principles in banks that enable efficient direction and control of the institution by its senior management.[3] Such frameworks also aim at establishing clear lines of responsibility as well as enhancing transparency and accountability and can thereby help to prevent misconduct.[4] Effective corporate governance in banks is recognised as a prerequisite for the proper functioning of the banking sector and the broader economy.[5] The tool is firmly anchored in Swiss financial market supervision and the promotion of responsible corporate governance in financial institutions constitutes one of the Swiss Financial Market Supervision Authority's (FINMA) strategic goals.[6] 1

Despite ongoing focus on prudential corporate governance in the increasingly tight-knit web of regulation, the banking sector is still prone to high-profile misconduct cases. They materialise in various ways, such as rogue or insider trading, account fraud, money laundering, reference rate or forex rigging, as well as corruption cases.[7] In Switzerland, the continuous emergence of corporate governance problems in the last few years presumably was part of the 2

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1 Cf. instead of many: HOPT, EBOR 2021, 3; KOKKINIS, Corporate Law, 115; FERRARINI, ECGI 2017, 3; DE LAROSIÈRE ET AL, EU Report 2009, 10; WALKER, UK Report 2009, 5.

2 See e.g. HOPT, ECGI 2013, 4 et seq.; EMMENEGGER, Prudentielle Corporate Governance, 10 et seq.

3 BCBS, Guidelines 2015, n 1, 3; FINMA-Circ. 17/1, n 2.

4 Cf. ESRB, Misconduct Report 2015, 3 et seq.

5 BCBS, Guidelines 2015, n 1; G30, Report Effective Governance 2012, 11.

6 FINMA, Strategic Goals, 9; see also FINMA-Circ. 17/1.

7 Cf. HELD/NOONE, Seattle U. Law Rev. 2020, 687-691; LLEWELLYN, Oxford Handbook Central Banking, 520; FSB, Toolkit 2018, v; CHALY ET AL, FRBNY White Paper 2017, 3; FSB, Stocktake 2017, 1; ESRB, Misconduct Report 2015, 3; G30, Report Report Conduct and Culture 2015, 11; HOPT, ECGI 2013, 33.

reason for the profound loss of trust in the (former) second largest bank Credit Suisse. It ultimately brought the bank to the brink of collapse, marking the first instance of a globally systemically important bank on the verge of resolution and necessitating a forced emergency takeover by its rival in March 2023.[8] While this constitutes one of the most prominent and recent examples it is by no means the only one.[9]

3 Governance issues in systematically important banks can result in the transmission of problems across the banking sector (nationally and internationally) and the whole economy with manifold consequences.[10] These problems can potentially affect clients and investors who lose their money; banks themselves by suffering financial losses, reputational damages and legal consequences; and ultimately, financial markets as a whole as the associated systemic risks pose continuous threats to its stability.[11] Severe events impose costs on society, as they not only damage confidence in the financial system, a key element for its functioning, but possibly create outright mistrust, weakening the ability of markets to allocate capital, again giving rise to systemic risk.[12]

4 The continuous turbulences in the banking industry sparked discussions around the globe.[13] International bodies and numerous national jurisdictions are showing a heightened focus on the human component in financial market supervision in general, but more specifically in the context of corporate governance. After all, it is recognised that corporate governance frameworks can only work efficiently if the key people, or more precisely the senior management, within them behave accordingly and take responsibility for their effec-

8 Cf. Expertengruppe Bankenstabilität, Report 2023, 10, 15, 67; FINMA, Report CS Crisis 2023, 45-49; FINMA, Press Release Merger 19.3.2023; BCBS, Report 2023, 13-16. regarding cases of corporate governance issues see e.g. FINMA, Press Release CS Greensill 28.2.2023; FINMA, Press Release CS Observation 20.10.2021; FINMA, Press Release CS Archegos and Greensill 22.4.2021.

9 Cf. e.g. FINMA, Press Release Julius Baer Institution 20.2.2020; FINMA, Press Release Raiffeisen 14.6.2018; FINMA, Press Release Falcon 13.10.2016; FINMA, Press Release UBS FX 12.11.2014.

10 BCBS, Guidelines 2015, n 1.

11 Cf. FSB, Toolkit 2018, 1; Chaly et al, FRBNY White Paper 2017, 3; G30, Report Conduct and Culture 2015, 11.

12 Cf. ESRB, Misconduct Report 2015, 3.

13 For discussions in academia see e.g. Held/Noone, Seattle U. Law Rev. 2020, 683 et seqq.; Llewellyn, Oxford Handbook Central Banking, 503 et seqq.; Zhu/Ferrarini, Governance of Financial Institutions, Chap. 16 n 16.01 et seqq.; Omarova, Cornell J. Law Public Policy 2018, 797 et seqq.; Cullen, Financial Markets, 154 et seqq.; for international bodies see e.g. BCBS Banking Turmoil 2023; FSB, Toolkit 2018; Khan, IMF Working Paper 2018; G30, Report Conduct and Culture 2018; FSB, Stocktake 2017; G30, Report Conduct and Culture 2015.

tive implementation. This led to an enhanced regulatory focus on senior management to address these persisting issues and foster effective implementation of sound frameworks.[14]

Subsequent regulatory responses have been evaluated and implemented in several jurisdictions.[15] For example, the United Kingdom introduced a "Senior Managers and Certification Regime" (SM&CR), a framework to concisely regulate senior management of financial institutions. The regime aims to strengthen individual accountability and corporate governance in financial institutions.[16] Moreover, the Netherlands established a novel supervisory methodology named "Supervision of Behaviour and Culture", pertaining to the two factors it sees as key aspects to ensure effective corporate governance and secure public trust.[17] Both of these jurisdictions count as pioneers with their distinct approaches and inspired other countries to adapt similar ones.[18] 5

In Switzerland, the political debate in reaction to the ongoing corporate scandals in banks was initiated before the second largest bank wreaked havoc. For example, in 2021 it was demanded that FINMA should be afforded an expanded toolkit to ensure accountability of the highest level of management in financial institutions. In response, the Federal Council commissioned the preparation of a report in which the existing instruments are analysed with regard to their effectiveness. The topic gained new momentum after the emergency takeover in March 2023 and the preparation of the corresponding report has subsequently been integrated into the analysis of this event.[19] It also led to the pub- 6

14 Cf. e.g. FSB, Toolkit 2018, 1; KHAN, IMF Working Paper 2018, 43; CHALY ET AL, FRBNY White Paper 2017, 3 et seq.; THAKOR, FRBNY Economic Policy Review 2016, 5; G30, Report Conduct and Culture 2015, 11, 13; RAAIJMAKERS, DNB Supervision of Behaviour and Culture, 14; similarly also BERTSCHINGER, SZW 2020, 706, who notes that issues with regards to corporate governance often do not lie within the frameworks (considered the hardware) but rather with the individuals (considered the software).

15 E.g. besides the United Kingdom and the Netherlands also the United States of America, Canada, Ireland, Singapore, Hong Kong, Australia.

16 ALLEN, BoE Bulletin Q3 2018, 7 et seq.; FSB, Toolkit 2018, 55.

17 Cf. RAAIJMAKERS, DNB Supervision of Behaviour and Culture, 15, 30 et seq.

18 Cf. e.g. FSB, Toolkit 2018, 70 et seq.; RAAIJMAKERS, DNB Supervision of Behaviour and Culture, 13; LLEWELLYN, Oxford Handbook Central Banking, 510; HELD/NOONE, Seattle U. Law Rev. 2020, 701, 704 et seq.

19 Postulate 21.3893 from Andrey Gerhard in the National Council from 18.6.2021 (incl. the respective statement of the Federal Council from 25.8.2021), accepted on 1.3.2022 by the National Council. See also postulate 21.4628 from Birrer-Heimo Priska in the National Council from 17.12.2021 (incl. the respective statement from the Federal Council from 16.2.2022), accepted on 2.5.2023 by the National Council. Cf. furthermore interpellation 23.3417 from Glättli Balthasar from 17.3.2023 (incl. the respective statement from the Federal Council

lication of another report concerning banking stability which proposes measures for further examination, such as adopting a senior managers regime.[20] Furthermore, FINMA revealed it had been working on a subsequent proposal for a such regime to the legislator and openly advocated to implement aspects of it. Moreover, the supervisory authority voiced its support in becoming authorised to impose fines.[21] The general academic discourse on corporate governance issues in banks, including the senior management's role in such, remains limited.[22]

II. Purpose of this Thesis

7 The described situation provides impetus to closely examine the role of senior management in prudential corporate governance frameworks from different viewpoints. Therefore, in an initial step this thesis seeks to examine prudential corporate governance against the general economic background. Building upon this foundation, it explores indications of an evolving understanding of senior management in these frameworks in light of the persisting issues in the banking sector, including subsequent recommendations from international bodies. After this international outline, the nationally emerging approaches to address the identified issues are presented. Countries such as the United Kingdom and the Netherlands are recognised as role models with their handling of the continued challenges, yet both chose very different methods.

from 24.5.2023), according to which the handling of the postulates is integrated into the review of the too big to fail framework (cf. also BankA 52). The report remains pending at the time of writing.

20 Cf. EXPERTENGRUPPE BANKENSTABILITÄT, Report 2023, 58. Following UBS's acquisition of Credit Suisse in March 2023, the Federal Department of Finance established the expert group "bank stability" (*Expertengruppe Bankenstabilität*), tasked with providing independent insights on the banking sector's role and regulatory framework in the context of financial market stability of Switzerland's financial market, see EXPERTENGRUPPE BANKENSTABILITÄT, Report 2023, 2. The findings of this report are of relevance for the further analysis of this event and thereby likely also for the review of the too big to fail framework as mentioned in the previous footnote.

21 AMSTAD, FINMA Address 2023, 5; FINMA, Report CS Crisis 2023, 48 et seq.

22 See e.g. more recent contributions such as BERTSCHINGER, SZW 2023, 714 et seqq.; LÜTHI, SZW 2023, 442 et seqq.; REISER, SZW 2022, 543 et seqq.; EMMENEGGER, AJP 2022, 817 et seqq. which refer to the issues and also recognise international developments.

Overall, these evolutions outside the borders of Switzerland provide renewed regulatory perspectives on how to include senior management in fostering effective corporate governance.

8 In light of these developments, the current situation of the regulation and supervision of senior management of systematically important banks in Switzerland is examined. While there is currently no specific regulation targeting this group of individuals, two main reference points can be found in the institutional licensing obligation of banks. For example, provisions regarding the banks' prudential corporate governance frameworks, as well as the requirement of the guarantee of irreproachable business conduct (*Gewähr für eine einwandfreie Geschäftstätigkeit*), as two key licensing requirements, significantly impact senior management.[23] Yet, given their embedding in institutional regulation, they are not easily identifiable and consequently require some sort of distillation in order for them to be analysable. As the licensed banks are subject to ongoing prudential supervision, the adherence to these requirements remains relevant for the whole supervisory law life cycle of authorisation, ongoing supervision and enforcement.[24] In the latter phase, there exist instruments directly targeting individuals in a leadership capacity, yet senior managers can also be affected by measures imposed on the institution.[25] Consequently, the regulation and supervision of senior management are disguised in institutional requirements, not easily identifiable and of relevance during the whole lifespan of a bank.

9 Prudential corporate governance and the guarantee of irreproachable business conduct tend to be researched and discussed separately. In addition, they have not, until now, been cohesively discussed from the viewpoint of senior management regulation and supervision.[26] While the herein relevant legal foundations have not recently experienced reforms, it is notable that FINMA's enforcement practices nevertheless show evolving tendencies. For instance, for the first time (as far as publicly known) it ordered a bank to determine man-

23 Cf. BankA 3 II a and c.

24 "Supervisory law life cycle" is not an established term in Swiss financial market law. However, BAUER, EF 2021, 608 refers to a cycle in the context of describing activities of FINMA and names authorisation, supervision, enforcement.

25 Cf. FINMASA 31 et seqq.

26 For a discussion of prudential corporate governance see e.g. BAUER, EF 2021, 608 et seqq.; STRASSER, Finanzmarktaufsicht, § 17 n 1 et seqq.; EMMENEGGER, Prudentielle Corporate Governance, 1 et seqq.; EMMENEGGER/KURZBEIN, GesKR 2010, 462; for the concept of the guarantee of irreproachable business conduct see e.g. BISCHOF; BRAIDI; ZULAUF, FINMA Sonderbulletin 2013, 8 et seqq.; AELLEN.

agerial responsibilities and provide them to the authority as part of corporate governance measures; moreover, it explicitly raised concerns about the culture of a bank and the behaviour of its executive management.[27] This illustrates that there seemingly is room to readjust the application of existing instruments. In addition, both of aforementioned examples show close similarities to the approaches of the United Kingdom and the Netherlands.

10 The setup in Switzerland and the absence of a cohesive discussion of senior management regulation and supervision, along with the limited academic discourse regarding these individuals, as well as the ongoing issues of prudential corporate governance in banks, constitute a significant opportunity for research. There is great potential in bridging the concepts of prudential corporate governance and the guarantee of irreproachable business conduct to explore their interdisciplinarity and understand to what extent they serve as a regulatory framework for senior management. Moreover, it is considered crucial to take a holistic look reflecting the whole supervisory law life cycle as opposed to, for example, solely discussing the effectiveness of enforcement measures. Assuming this perspective not only helps to identify potential issues in the overall framework but also opportunities of leveraging existing instruments. The previously elaborated international developments in this regard aid in understanding possible problems and provide a range of complementary or supplementary approaches which Switzerland could pursue if considered necessary.

11 The scattered regulatory situation and the scarce discourse of senior management regulation and supervision in Switzerland, along with the international developments regarding these individuals' roles in prudential corporate governance frameworks, provide the impetus for this thesis. Subsequently, the present work seeks to contribute a comprehensive analysis of senior management regulation and supervision in light of prudential corporate governance in Switzerland, also in exploration of emerging approaches from the United Kingdom and the Netherlands.

27 FINMA, Press Release CS Greensill 28.2.2023, 3; FINMA, Press Release CS Observation 20.10.2021, 2.

III. Research Questions

To achieve these objectives the research is conducted along the following questions: 12

- What international developments can be identified in the context of the senior managements' role in prudential corporate governance frameworks of banks?
- How is senior management of large Swiss banks regulated and supervised considering its reciprocal influence with prudential corporate governance and along the supervisory law life cycle of authorisation, ongoing supervision and enforcement?
- Which novel methodologies can be identified from the emerging approaches towards senior management regulation and supervision pursued by the United Kingdom and the Netherlands?
- What implications and future perspectives for Switzerland can be derived from the synthesis of the preceding analyses?

IV. Structure

Part 1 introduces and contextualises corporate governance in banks from economic and legal perspectives, examining the role of senior management. It discusses the perceived reasons for and subsequent responses to ongoing issues with bank management from an international perspective. In addition, it introduces two *emerging approaches* in addressing these challenges, the United Kingdom and the Netherlands. 13

Starting from part 2, the focus is on national Swiss law, where an assessment of senior management in light of prudential corporate governance along the different phases of the supervisory law life cycle of authorisation (part 2), supervision (part 3), and enforcement (part 4) is conducted. The structures of parts 2 to 4 follow a similar pattern. They commence with an analysis of the Swiss approach to regulation and supervision of senior management of banks, examined by presenting the rules *de lege lata*. The analyses will be conducted from two perspectives: from an organisational one, with a focus on relevant 14

corporate governance provisions towards banks which indirectly exert influence on the regulation of senior management; and from a personnel perspective, examining the licensing requirements which address individuals. Corporate governance and senior management are seen reciprocal in this context: on one hand, corporate governance frameworks influence senior management and on the other, senior management is also responsible for ensuring implementation of and adherence to corporate governance frameworks. After the analysis of each phase, results are then presented. Subsequently, corresponding emerging approaches from the United Kingdom and the Netherlands are outlined along the supervisory law life cycle.

15 Finally, part 5 combines the previous findings. It elucidates the various perspectives of senior management and prudential corporate governance. Building upon the previous analyses, it reflects on the Swiss approach and discusses main implications for the Swiss setup from a holistic perspective. For these, possible future avenues for senior management regulation and supervision are presented, also incorporating measures along the spectrum of emerging approaches.

V. Scope

16 While the research subjects touch upon many legal fields, the study is solely conducted from a financial market supervisory law perspective. Where considered necessary, reference is made to relevant criminal, private or *general* public law (as opposed to *specific* supervisory law) provisions in the form of indicative delimitations.

17 The present work includes selective presentations of approaches from the reference jurisdictions, the United Kingdom and the Netherlands. As these countries are considered pioneers with their respective methods, the aim is to present the distinct key features of their emerging approaches. Thereby, the range of possibilities for senior management regulation and supervision is illustrated. Reference is also made to relevant developments of international bodies. The work does not aim to provide a comprehensive legal comparison.

18 This thesis addresses some broad concepts, which are not necessarily (solely) bank-specific or exclusively legal concepts, such as corporate governance or culture. Their inclusion is solely based on their relevance to the research topic.

Regarding institutions as the supervised entities, the focus of the examination is on (globally) systemically important banks, given their pivotal role in Switzerland's economy. From a personal perspective, as the title indicates, the highest level of governing bodies, the senior management of banks, are in scope of the present research. 19

Part 1: Contextualisation

The first part elucidates the herein relevant concepts, establishing their significance, and contextualising them within the research scope. It commences by dissecting the economic underpinnings of corporate governance, highlighting the distinctiveness of banking institutions and their implications on governance frameworks. The recognition of these unique aspects within legal frameworks is then explored by introducing the concept of prudential corporate governance from an international bodies' point of view. The study proceeds to scrutinise the role of senior management within this specialised governance framework. After laying these foundations, the narrative progresses to reflect on the contemporary perception and issues of bank corporate governance. The subsequent responses from international bodies are then presented, before two jurisdictions are examined which are considered role models in addressing the previously identified issues with their emerging approaches.

Consequently, this part assumes an international perspective, outside the borders of Switzerland. The ensuing parts will then dive deeper into the Swiss setup.

I. Corporate Governance of Banks as a Specialised Concept

A. Preliminary Conceptual Terminologies

1. Corporate Governance

20 Before the *corporate governance* of *banks* will be discussed, it is important to gain a preliminary common understanding of both of these key terminologies. The term *corporate governance*, despite its increasing prominence in both academic discourse and practical application, continues to be characterised by a high degree of ambiguity. Its definitions are notably diverse and heavily dependent on the specific context in which they are applied.[28] A look into the dictionary provides the following starting points: *Corporate* pertains to "*forming or being a corporation; having a legal existing distinct from that of the individuals who compose it*" or "*of or belonging to a corporation*" and whereby corporation is described as "*a body of people that has been given a legal existence distinct from the individuals who compose it*; […]; *a fictious person created by statute*, […]".[29] *Governance* describes "*the act or manner of governing*; […] *controlling or regulating influence* […]".[30]

21 From an abstract economic perspective, it is often described as a general social-scientific phenomenon, primarily concerned with the problem of power, particularly within large and socially significant business corporations. This view positions corporate governance at the forefront of power allocation discussions, emphasising its crucial role in shaping the internal dynamics of these organisations.[31] It revolves around decision-making within a corporation, which involves an enquiry into the causes and consequences of the allocation of corporate decision-making power and its distribution within corporations.[32]

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28 Moore/Petrin, 3; Hermalin/Weisbach, 178; Gilson, Oxford Handbook Corporate Governance, 25.

29 Brown et al, Oxford Dictionary, 515.

30 Brown et al, Oxford Dictionary, 1123.

31 Moore/Petrin, 23.

32 Hermalin/Weisbach, 200; Moore/Petrin, 4.

In its essence corporate governance encompasses establishing adequate and appropriate control system within organisations. This structural framework is vital for protecting the corporation's assets and overseeing the complex interactions among a company's management, board of directors, shareholders, and wider stakeholders. Its main objective is to prevent undue power concentration in the hands of any one individual, ensuring that the organisation primarily operates in the interests of shareholders, but also stakeholders. Moreover, it enhances transparency and accountability, elements vital for sustaining trust and efficiency in organisational operations. Also, governance plays a critical role in guiding companies towards achieving their objectives and effectively monitoring their performance.[33] It serves a significant function in ensuring that financiers of corporations receive favourable returns on their investments, underlining its importance in the broader context of corporate finance and investment.[34] 22

Corporate governance constitutes an interdisciplinary topic which is explored from various perspectives.[35] It is considered both an economic and a legal institution, subject to adjustments through the political process.[36] Today, it is recognised that core legal institutions significantly influence corporate governance by setting up institutional structures introducing vital incentives, constraints, and objectives, that intertwine with extra-legal factors. This interplay highlights the importance of examining corporate governance from both legal and economic viewpoints.[37] 23

The *concept* of corporate governance is far from novel. Its roots are traced back to around 1343-1400, where *governance* was originally employed in the context of managing cities or states. The evolution of *corporate* governance has been closely linked to the development of corporations themselves.[38] Yet, the *term* corporate governance is relatively new.[39] It only gained prominence in the 1970s, when discussions about managerial accountability, board structure, and shareholder rights began to surface under this label.[40] In the 1980s, the general focus shifted towards the directors' responsibility to increase 24

33 Gilson, Oxford Handbook Corporate Governance, 8; Mallin, 10 et seq.
34 Shleifer/Vishny, J. Finance 1997, 737.
35 Hermalin/Weisbach, 178.
36 Shleifer/Vishny, J. Finance 1997, 738.
37 Hermalin/Weisbach, 178, 181; Moore/Petrin, 4; Pacces, 2 et seq.
38 See Tricker, 2 et seq., who describes the evolution from governance to corporate governance alongside the development of the corporation.
39 Hopt, Comparative Corporate Governance, 10.
40 Cheffins, Theor. Inq. Law 2015, 2, 5.

shareholder value, but by the late 1980s, the negative implications of this approach became evident. This period witnessed a series of corporate collapses worldwide, prompting official inquiries and, subsequently, academic research into corporate governance. In the 1990s, the first corporate governance codes were established, with the United Kingdom's "Cadbury Committee Report on the Financial Aspects of Corporate Governance" (also: Cadbury report) of 1992 being at the forefront of this development. It set a precedent for other countries and significantly influenced the modern understanding of corporate governance.[41] The movement of the 1990s led to the rapid proliferation of corporate governance codes globally, especially in nations with developed stock markets. By the start of the 21st century, most of these countries had established their own sets of corporate governance principles.[42] Providing guidance from an international perspective, the G20/OECD "Principles of Corporate Governance" (also: OECD principles) are considered the standard reference framework for policymakers in developed economies.[43]

25 While the term corporate governance lacks a clear legal definition in most jurisdictions, it is today often linked with corporate law or codes for (listed) companies, which encompass mechanisms and aspects pertinent to corporate governance.[44] From a legal perspective, a commonly referenced definition is the one from the Cadbury Report, according to which corporate governance is "[…] *the system by which companies are directed and controlled*".[45] Similarly, the OECD principles describe it as involving "[…] *a set of relationships between a company's management, board, shareholders and stakeholders*" and furthermore as providing "[…] *the structure and systems through which the company is directed and its objectives are set, and the means of attaining those objectives and monitoring performance are determined*".[46] These definitions, notable for their brevity, shed a light on the understanding of corporate governance and its essential role in business practices. However, its mechanisms vary considerably

41 Tricker, 10-13; cf. Cadbury, UK Report 1992.

42 Gilson, Oxford Handbook Corporate Governance, 4 et seq.; Tricker, 15; Cheffins, Theor. Inq. Law 2015, 5.

43 OECD, Corporate Governance Principles 2023, 6; Moore/Petrin, 3; Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 456.

44 Moore/Petrin, 4; Gilson, Oxford Handbook Corporate Governance, 5, 15 et seq.; Hopt, Comparative Corporate Governance, 10.

45 Cadbury, UK Report 1992, n 2.5. For references to this definition see e.g. Chiu/Wilson, 542; Hopt, Comparative Corporate Governance, 10; Moore/Petrin, 3; Hart, Econ. J. 1995, 682.

46 OECD, Corporate Governance Principles 2023, 6. See e.g. also Hodges, 631; Moore/Petrin, 3; Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 456 who reference this definition.

worldwide, reflecting diverse institutional and cultural contexts.[47] It is worth mentioning, that this type of *internal* corporate governance is not the sole means of aligning the interests of managers and shareholders. Other, *external* mechanisms for example include the market for corporate control or transparency and disclosure measures, which can also have a disciplining influence on management.[48]

Keeping this preliminary descriptive terminology of corporate governance in mind, the understanding concept for the present means will become more accentuated in the course of the ensuing sections.[49] 26

2. Bank

As this chapter explores corporate governance of banks, fostering an initial common understanding of these institutions is equally important. The roots of banking can be traced back to ancient Egyptian and Babylonian civilisations, whereas the foundations of today's banking and loan payment systems originated during the Italian renaissance from 14th to 17th century. Ever since, banks have been playing pivotal roles in economies.[50] Today they are diverse and complex financial institutions. At the heart of their operations lies their function of financial intermediation: they take in funds from depositors and lend them out to borrowers. This process of maturity transformation is central to the functioning of banks and is crucial for creating liquidity in the economy.[51] It is also the key attribute upon which a financial institution is considered a bank in the regulatory sense.[52] 27

Additionally, banks play a significant role in managing intricate payment services systems. These systems facilitate a wide array of transactions for individuals and businesses, including services through cash machines, credit cards, checks, debit cards, and electronic transfers. This function is pivotal as 28

47 Moore/Petrin, 3; Hermalin/Weisbach, 178; Gilson, Oxford Handbook Corporate Governance, 25.

48 Kokkinis, Corporate Law, 49; Hopt, Comparative Corporate Governance, 12.

49 See especially n 47-50, 59-63.

50 Cranston et al, 3.

51 Freixas/Rochet, 1 et seq.; Busch/Ferrarini/van Solinge, Governance of Financial Institutions, Chap. 1 n 1.04, Cranston et al, 5; Bossone, World Bank Working Paper 2000, 3; Kokkinis/Miglionico, 6. From a legal point of view, there is no definition of a bank in Swiss law. Rather, the Banking Act takes on a descriptive approach in delimiting what a bank is, see Werlen, Bankgeschäft, n 5-23.

52 Freixas/Rochet, 1 et seq.

it ensures the efficient movement of money within and across economies, enabling commerce and everyday financial activities.[53] Over time, banks have evolved into multifaceted and highly complex institutions. Beyond their traditional roles, they now engage in activities such as securities and derivatives trading, investment management, and, often through subsidiaries, services in insurance and pensions.[54] In addition, banks are inextricably connected to the money supply, making them a crucial channel for implementing monetary policy. The evolution of banks over the past centuries, leading up to the current era of open global markets, has intensified the challenge of ensuring their safety and stability, making this task increasingly complex and demanding.[55]

29 If the failure or the distress of a bank can produce externalities and spill-over effects to the financial sector and potentially the broader economy, the institution is considered a systemically important bank (so-called SIB), or globally systemically important bank (G-SIB) if the disruption can spread across jurisdictions.[56] The collapse of these large banks is viewed as a critical risk, as their failure could trigger a cascading effect of widespread financial contagion, loss of trust and overall instability in the system.[57] While the focus of the present work is on SIBs, sometimes these firms are also referred to under the broader concept financial institutions; while on the other hand, when it is referred to as a bank, it could also encompass other financial institutions. The functions and specificities of banks will be further elucidated in their contextualisation with corporate governance in the following section.

53 Kokkinis/Miglionico, 6.

54 Ellinger/Lomnicka/Hare, 80 et seq.

55 Cranston et al, 3.

56 Kokkinis/Miglionico, 27. As of January 2024, the following institutions count as SIBs (cf. BankA 8): Credit Suisse, UBS, PostFinance, Raiffeisen and Zürcher Kantonalbank. Credit Suisse and UBS count as G-SIBs, however Credit Suisse will be integrated into UBS following its acquisition in March 2023, see also Expertengruppe Bankenstabilität, Report 2023, 16.

57 Cranston et al, 4.

B. Economic Perspective

1. General Function of Corporate Governance

1.1. Corporate Governance as a Means to Align Corporate Interests

As explored previously, the evolution of corporate governance is closely linked to the development of corporations, or more specifically, of joint-stock companies.[58] Today, the prevalent view of corporate governance is through the lens of the shareholder model (also shareholder theory, view or primacy). This approach, dominant in economic theory, asserts that a company's primary duty is to maximise shareholder value. Consequently, the main goal of corporate governance is to align the interests of management with those of shareholders, thereby enhancing the value for the latter.[59] 30

This need for alignment arises from the separation of ownership and control in modern corporations. Adam Smith, widely regarded as the forefather of free-market capitalism and an economic and legal scholar, was early to express concerns about the functionality of joint-stock companies. Such became increasingly popular in early industrial Britain in the late 1700s.[60] His scepticism was towards the organisational construction of this legal form and the fact that the directors of such companies were not doing business with their own funds but rather with the funds provided by third parties. Accordingly, in the year of 1776, he famously stated: "*The directors of such companies* [...] *being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own.*"[61] Similarly, in 1932, Berle and Means observed that ownership was being relegated to a legal and factual interest, while control rested with those managing 31

58 For the preliminary definition of corporate governance see herein n 20-27 et seq.

59 Tirole, 3, 23; Larcker/Tayan, 8; Gilson, Oxford Handbook Corporate Governance, 15; Hopt, Comparative Corporate Governance, 10. Some economists see the shareholder theory as too narrow for an economic analysis of corporate governance and therefore favour moving away from the traditional shareholder value to a broader concept of stakeholder theory, aiming at a better representation of interests of the non-investing parties, see e.g. Tirole, 3, 23 et seq.; Larcker/Tayan, 9 for a discussion.

60 Moore/Petrin, 13; Pacces, 2.

61 Smith, 741; see e.g. Jensen/Meckling, JFE 1976, 305; Hopt, Comparative Corporate Governance, 7; Moore/Petrin, 13 who also reference this quote.

the company.[62] Consequently, the recognised issue of misalignment between investor and management incentives, due to the separation of ownership and control common in joint-stock companies, has been known for centuries.[63]

32 Agency theory, or agency relationship, is a core concept in discussing this separation. The agency relationship is one of the oldest and commonest codified modes of social interaction mechanisms. An agency relationship exists between at least two parties, in which one party (the principal) engages another party (the agent) to perform services on their behalf, involving some delegation of decision-making authority. Initially explored by legal scholars, agency theory is today used to address the issues arising from the disconnect between corporate ownership and control.[64] The most pertinent agency relationship is between shareholders (principals) and managers (agents). Shareholders, as company owners, hold ultimate residual control rights through their voting power. However, due to their often dispersed nature, they delegate day-to-day management to appointed agents (managers).[65] Ideally, this relationship would be governed by a comprehensive contract outlining all managerial duties and profit allocation. Yet, the impossibility of anticipating all future contingencies renders such complete contracts unfeasible. Consequently, managers are given residual control rights to make decisions in unforeseen circumstances.[66]

1.2. Problems in Agency Relations

33 Should owners directly manage their firms, it is presumed they would act in alignment with their own best interests. However, when management is delegated to corporate agents, it raises the question of whether these agents will act in the owners' (principals') interests. This alignment hinges on the extent to which agents' self-interest coincides with that of the principals.[67] The critical challenge involves incentivising agents to prioritise the principals' interests, rather than exclusively their own.[68] At the heart of this agency problem is the disjunction between management and finance, manifesting in the separa-

62 Berle/Means, 113 et seq., whilst this references the current edition of their work published in 1991, this was statement was already made in their original publication from 1932 on pages 119 et seq.

63 Moore/Petrin, 13.

64 Ross, AER 1973, 134; Pacces, 2 et seq.; Kokkinis, Corporate Law, 41.

65 Jensen/Meckling, JFE 1976, 308; Hart, Econ. J. 1995, 681; Mallin, 19.

66 Shleifer/Vishny, J. Finance 1997, 741.

67 Berle/Means, 113 et seq.

68 Armour/Hansmann/Kraakman, 29 et seq.

tion of ownership and control.[69] It is generally posited that most economic agents prioritise their welfare over societal benefit. Consequently, given that both principals and agents are driven by utility maximisation, there is no guarantee that agents will consistently act in the best interest of the principals.[70] The interests of the principal and agent may diverge, and typically, the principal-agent relationship is thereby not free of defaults.[71]

Thereby, the very setup of the agency relationship gives rise to an array of specific problems. First and foremost, such agency relationships are characterised by their inherent *information asymmetry*. As the agent possesses more information than the principal, this makes it difficult or impossible for the principal to verify the agent's performance and whether the agent acts in the principal's best interest.[72] This information asymmetry can lead to *conflicts of interest*, with the agent potentially exploiting this advantage.[73] Agency relations can also give rise to specific *moral hazards*. This concept describes situations of opportunism, where economic agents act in their own interest at the expense of others, as they do not bear the full consequences of their actions.[74] Moreover, agency relations lead to so-called *agency costs*. These arise when the separation of power between a company's owners and its management leads to self-interested actions by the management, leading to costs for the shareholders and stakeholders.[75] To align the agent's actions with the principal's interest, monitoring costs are incurred. However, continuous monitoring is not economically viable.[76] Agency costs refer to the losses shareholders incur when managers do not prioritise shareholders' best interests.[77] An associated challenge is the *free rider* problem, particularly prevalent in companies with dispersed ownership. Individual shareholders may be disinclined to actively monitor and influence management, knowing that the benefits of any improved company performance, stemming from their monitoring efforts, would be distributed among all shareholders. Consequently, since only the monitoring

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69 Shleifer/Vishny, J. Finance 1997, 741.
70 Tirole, 24.
71 Eisenhardt, AOM 1989, 58; Mallin, 19 et seq.
72 Armour/Hansmann/Kraakman, 29 et seq.; Mallin, 19 et seq.
73 Pacces, 27.
74 Alexander, JBR 2006, 20.
75 Larcker/Tayan, 4; Moore/Petrin, 36.
76 Jensen/Meckling, JFE 1976, 308; Ross, AER 1973, 138; Eisenhardt, AOM 1989, 58; Armour/Hansmann/Kraakman, 30.
77 Moore/Petrin, 36; Pacces, 31.

shareholder incurs the costs (time, effort, and resources), every shareholder will hope that other shareholders will do the monitoring. This leads to a situation where minimal or no effective oversight of management occurs.[78]

1.3. Relevance for Corporate Governance

35 The foundational aim of the corporate governance movement has been to mitigate agency problems inherent in modern corporations.[79] Corporate governance is crucial in navigating the complexities of the principal-agent relationship, constituting a suite of mechanisms designed to curtail managerial actions that may adversely affect the interests of shareholders and stakeholders. It is central to the functioning of contemporary corporate entities, ensuring that the divergent interests between owners and managers are aligned and managed effectively.[80] Good corporate governance is characterised by its ability to select competent managers and hold them accountable to investors.[81] It involves methods through which financiers of corporations ensure returns on their investments by encouraging managers to deliver profits, prevent misappropriation of capital, and overall responsible fund allocation in projects and overall mechanisms that enable financiers to maintain oversight of managerial actions.[82] Central to corporate governance are the board of directors and the executive management, along with the shareholders. The board, elected by shareholders to represent their interests, plays a pivotal role in overseeing management and approving major decisions. This oversight is a key mechanism in mitigating agency problems.[83]

78 Hart, Econ. J. 1995, 681.
79 Kokkinis, Corporate Law, 41.
80 Larcker/Tayan, 8.
81 Tirole, 2.
82 Shleifer/Vishny, J. Finance 1997, 737.
83 Mallin, 17; Hart, Econ. J. 1995, 681; Moore/Petrin, 17.

2. Distinctive Characteristics of Banks and Their Impact on Corporate Governance

2.1. Economic Role and Systemic Relevance

Following the examination of the general role of corporate governance, attention now turns to its application in the banking sector. Building upon the previously established terminological foundation of banks, the focus shifts to first exploring their unique characteristics and how these give rise to distinct questions in corporate governance.[84] 36

As indicated previously, banks engage in a *unique business model* by providing transaction accounts, setting them apart from other financial entities.[85] A central aspect of their operation is maturity transformation. This involves utilising liquid, short-term deposits (constituting the banks' liabilities) to issue illiquid, long-term loans (forming the banks' assets). Essentially, banks finance most of their operations through debt, creating liquidity within the economy.[86] The core of a bank's business model lies in voluntarily accepting a mismatch in the term structure of its assets and liabilities and its ability to function relies on continuous and uninterrupted access to liquidity.[87] Given that these institutions cannot typically satisfy a significant portion of their liabilities instantaneously, this mismatch exposes them to liquidity risks, notably in the form of bank runs.[88] For the risks associated with this maturity mismatch, banks charge a premium to their creditors as compensation. This is evident in the higher interest rates charged on loans compared to the rates banks pay for their refinancing. As a result, the profitability of a bank increases in direct proportion to the volume of its lending activities.[89] 37

84 For the preliminary definition of banks see n 27 et seq. of this thesis.

85 Corrigan, FRB Minneapolis Report 1982, 7.

86 Macey/O'Hara, FRBNY Policy Review 2016, 97; Laeven, Annu. Rev. Financ. Econ. 2013, 67; Armour, Oxford Handbook Corporate Governance, 1112.

87 Kokkinis, Corporate Governance Banks, n 1.22; Mülbert, ECGI 2010, 10, who names deposits, short-term funding on the interbank market, funding on secured financing markets or funding from a central bank as the liquidity provider of last resort as possible liquidity sources.

88 Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 444; Laeven, Annu. Rev. Financ. Econ. 2013, 67. A bank run refers to a scenario where depositors unexpectedly and extensively withdraw their deposits, depleting the bank of its liquid assets which puts the institution at risk of insolvency, see Armour et al, 441, 479, 482 et seq.

89 Mülbert, ECGI 2010, 10.

38 Moreover, by providing essential financing and payment services, banks hold a *pivotal position in the economy*.[90] They are the primary liquidity sources for the real economy and various institutions and the public, making their stability crucial to the welfare of stakeholders like employees, clients, suppliers, and citizens.[91] In performing their different functions, banks are not only the most important component in the financial system, but ultimately also play a critical role in the allocation of capital in the economy.[92]

39 Consequently, banks are intricately linked within the banking sector. Much banking activity, including transactions in the interbank and foreign exchange markets, involves extensive interactions between banks themselves.[93] To manage liquidity, banks often borrow substantial sums from each other over short periods.[94] This interdependence, where competitors simultaneously act as business partners, creates a web of counterparty risks. The interconnected nature of these relationships means that financial distress in one bank can rapidly propagate to others.[95] Such contagion poses as a *systemic risk*, as it can extend beyond the banking sector, affecting the entire financial market but also the real economy, given their intertwinement. Thereby this spill over might lead to widespread economic disruption and, as a failure in one bank can impair the financial health of others, the broader economy is ultimately impacted and businesses' access to finance is hindered.[96] Another important aspect in this context constitutes the banks' fundamental need for trust as a critical element for them to function.[97] One major bank failure has the potential to lessen confidence in other banks; this again may lead to bank runs.[98] Given the banks' central role in the economy and the significant negative impact of their failure the agency problems in banks carry significant wider eco-

90 Alexander, JBR 2006, 18; see also n 27 herein.

91 Kose/De Masi/Paci, CGIR 2016, 306; Laeven, Annu. Rev. Financ. Econ. 2013, 67; Corrigan, FRB Minneapolis Report 1982, 9.

92 Freixas/Rochet, 1 et seq.; Cranston et al, 6.

93 Mülbert, ECGI 2010, 11.

94 Kokkinis, Corporate Governance Banks, n 1.26.

95 Mülbert, ECGI 2010, 11; Kokkinis, n 1.26. The latter author also observes in n 1.32 that in most other industries, the exact opposite is the case. Hence if one company fails, it leaves it competitors strengthened and the system itself intact. As such, those company failures are rather seen as a manifestation of the proper functioning of market forces, ensuring efficient allocation of capital and thus the development of the economy.

96 Armour, Oxford Handbook Corporate Governance, 1112; Kokkinis, Corporate Governance Banks, n 1.25, n 1.32.

97 Hopt, EBOR 2021, 3; Kokkinis, Corporate Governance Banks, 1.26.

98 Kokkinis, Corporate Governance Banks, n 1.26.

nomic consequences and are costlier for the economy at large, compared to such in other firms.[99]

2.2. High Leverage

Another distinctive feature of banks constitutes their unique capital structure, characterised by significant leverage due to their core business practices. The vast majority of their financing is derived from debt, with a relatively small portion coming from equity.[100] This high leverage, in stark contrast to non-financial firms, increases the risk of default, as banks often lack sufficient capital buffers to absorb losses and prevent insolvency.[101] Moreover, depositors and other debtholders are the major provider of capital for banks.[102] Such deposits are usually taken from an extraordinary large number of depositors.[103] Dispersed depositors do not have incentives to monitor bank managers, given the great informational asymmetry and high coordination cost.[104] 40

2.3. Opacity

The balance sheets of banks not only lack liquidity but are also significantly opaque, differing markedly from those of other companies. Predominantly composed of borrower claims and complex financial instruments, these assets are difficult to evaluate, more so than for example tangible assets like machinery in firms of the real economy.[105] Consequently, banks inherently have superior information about the viability of assets. For example, the complexity can obscure loan quality, often not apparent for extended periods. Such scenarios 41

99 DE HAAN/VLAHU, J. Econ. Surv. 2016, 230.

100 LAEVEN, Annu. Rev. Financ. Econ. 2013, 66 et seq.

101 HOPT, EBOR 2021, 3; KOKKINIS, Corporate Governance Banks, n 1.28, 1.45; MACEY/O'HARA, FRBNY Policy Review 2016, 97; see also VAN DER ELST, ECGI 2015, 10, who gives a brief overview of the development of the debt situation over the years.

102 KOSE/DE MASI/PACI, CGIR 2016, 304.

103 LAEVEN, Annu. Rev. Financ. Econ. 2013, 67.

104 DE HAAN/VLAHU, J. Econ. Surv. 2016, 230; ARMOUR, Oxford Handbook Corporate Governance, 1112.

105 KOKKINIS, Corporate Governance Banks, n 1.41; FERNANDES ET AL, JBR 2018, 10; MÜLBERT, ECGI 2010, 11. Moreover, LAEVEN, Annu. Rev. Financ. Econ. 2013, 67 notes that e.g. sectors where success relies heavily on research and development face similar issues. For instance, pharmaceutical companies make substantial, uncertain investments over long periods. Banking business is still distinct as it bases on the unique combination of high leverage with assets that are opaque, which encourages risk-taking. Others see the opacity of bank balance sheet as specific but not necessarily unique, see e.g. VAN DER ELST, ECGI 2015, 9.

lead to further pronounced informational asymmetries, as only banks hold more detailed insights than depositors or other stakeholders.[106] This opacity also enables banks to undertake rapid and heightened risk-taking, often concealed from external stakeholders, and changes in the risk profile of assets may not be immediately visible for outsiders.[107] By transferring risks to third parties and benefiting from risky ventures, moral hazard for bank managers is potentially exacerbated.[108] Shareholders and debt holders faces challenges in overseeing bank management, given the complexity, inherent informational asymmetries and dispersed ownership. Traditional monitoring tools are less effective in banking due to these specifics.[109]

2.4. Regulation

42 Another special feature of banks is that they are highly regulated worldwide and account for one of the most regulated institutions, which sets them apart from less regulated or unregulated industries.[110] This regulation encompasses diverse areas such as market entry barriers, capital requirements, ownership or activities and are guided by international standards like those of the Basel Committee on Banking Supervision (BCBS).[111] The extensive regulation acknowledges banks' pivotal roles in credit and payment systems, economic development, and financial stability, while considering their vulnerability to systemic risks.[112] However, if shareholders or stakeholders perceive their oversight as duplicative of official supervision, they might reduce their monitoring efforts.[113] Regulatory mechanisms like government guarantees and de-

106 Alexander, JBR 2006, 21; Levine, World Bank Working Paper 2004, 2 et seq.

107 Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 445; Laeven, Annu. Rev. Financ. Econ. 2013, 67.

108 Armour et al, 562; Ferrarini, ECGI 2017, 6.

109 Levine, World Bank Working Paper 2004, 7.

110 Adams/Mehran, J. Finan. Intermedation 2012, 2.

111 Laeven, Annu. Rev. Financ. Econ. 2013, 68; Levine, World Bank Working Paper 2004, 3. The Basel Committee on Banking Supervision (BCBS) is the primary global standard setter for the prudential regulation of banks established in 1974, comprising central bank governors and national bank supervisors from G20 member states. Its aim is to enhance the understanding of supervisory issues and improve banking supervision quality worldwide. While influential, the BCBS does not possess formal rule-making authority. Administratively, it operates under the Bank for International Settlements (BIS) whose main function is to promote international monetary and financial cooperation, see Armour et al, 886; Emmenegger, Handbuch Corporate Governance, n 5-8.

112 Fernandes et al, JBR 2018, 241.

113 Lewellyn, Corporate Governance FIs, 74; Song/Li, International Banking and Governance, 18.

posit insurance schemes are debated to incentivise risky behaviour of banks, and especially induce moral hazard, therefore exacerbating agency problems.[114] Government guarantees might shift risks to regulators or depositors, and deposit insurance could decrease depositors' incentives to scrutinise bank practices, potentially undermining banking discipline.[115] Owners of a bank do not internalise the risk that a failure of their bank poses to the rest of the financial system, despite its potential significant harm to the broader economy.[116] Additionally, regulatory frameworks often limit the market for corporate control in the banking sector. For instance, regulatory approval for mergers can weaken mechanisms like hostile takeovers, a threat which could otherwise align management with shareholder interests.[117]

2.5. Stakeholders

At the same time, bank supervisors (and regulators) are key stakeholders of banks. In a well-functioning banking system, supervisors and regulators themselves are considered agents acting on behalf of broader stakeholder interests in the economy at large.[118] This points to the extended stakeholder base of banks: the spectrum of key stakeholders in these institutions is broader as it encompasses most importantly their depositors, creditors, and individual citizens. Additionally, taxpayers become stakeholders, especially when public funds are utilised to support financial institutions in distress.[119] The health of the banking system is closely tied to the economic well-being of these stake- 43

114 Macey/O'Hara, FRBNY Policy Review 2016, 97; Alexander, JBR 2006, 22; Levine, World Bank Working Paper 2004, 10 et seq.; Hopt, ECGI 2013, 19; de Haan/Vlahu, J. Econ. Surv. 2016, 230. Government guarantees describe implicit or explicit assurances by the government to back certain financial obligations of banks. They are considered implicit e.g. in the case of too big to fail banks, where these institutions will likely be saved if they need to be, given their systemic relevance, see e.g. Armour et al, 561. Deposit insurance schemes can be part of explicit government guarantees and their mechanisms, typically backed by the state or a state-supported fund, which guarantee the claims of short-term funders against a bank in the event of its default. These schemes assure depositors that they will not lose their funds, thereby aiming to prevent runs on banks during financial panics, see Armour et al, 504 et seqq.

115 Alexander, JBR 2006, 22; Kokkinis, n 1.58; Fernandes et al, JBR 2018, 241; Levine, World Bank Working Paper 2004, 10; de Haan/Vlahu, J. Econ. Surv. 2016, 230; Armour, Oxford Handbook Corporate Governance, 1112.

116 Laeven. 73; de Haan/Vlahu, J. Econ. Surv. 2016, 230.

117 de Haan/Vlahu, J. Econ. Surv. 2016, 232 et seq., see also Song/Li, International Banking and Governance, 24.

118 Alexander, JBR 2006, 18.

119 Fernandes et al, JBR 2018, 239, 241; Adams/Mehran, J. Finan. Intermedation 2012, 8; Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 445; EU Commission, Green Paper 2010, 4.

holders.[120] The expanded stakeholder base also broadens the bank management's accountability spectrum and introduces more intricate agency problems.[121] Consequently, not only the interests of the shareholders (which is the primary focus of traditional corporate governance), but also these further stakeholders have to be taken into account.[122] The interests of these groups not only potentially diverge but also conflict. For instance, while bank owners may be favourable of a bank taking higher risk for greater returns, debt holders may disproportionately face the consequences of potential financial instability, whilst they cannot participate in a potential upside from the risk taking, making them less favourable of increased risk-taking.[123] More specifically, corporate governance of banks should be designed to align managers' interests with those of debtholders', including depositors.[124]

3. Adapting Corporate Governance for Banks

44 It is now widely recognised in theory, practice, and regulation that the internal corporate governance of banks is more complex than in other firms, considering their unique business nature and crucial economic role. Thereby, its means cannot be reduced to a simple conflict of interest between shareholders and management, as in other firms.[125] Their distinctive characteristics require a different approach to corporate governance compared to other corporations in the broader economy. Consequently, traditional corporate governance models, although empirically established, cannot be seamlessly applied to banks.[126] The special characteristics of banks potentially increase corporate governance problems and might reduce the effectiveness of traditional mechanisms.[127]

45 Despite this understanding, much empirical research on bank corporate governance still relies on the traditional model, often neglecting the unique aspects and stakeholder interests specific to banks.[128] The field of bank corpo-

120 Alexander, JBR 2006, 19.
121 Cranston et al, 94; EU Commission, Green Paper 2010, 2.
122 Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 445.
123 Levine, World Bank Working Paper 2004, 7; Armour, Oxford Handbook Corporate Governance, 1112.
124 de Haan/Vlahu, J. Econ. Surv. 2016, 230.
125 EU Commission, Green Paper 2010, 4.
126 Hopt, EBOR 2021, 16 et seq.; Adams/Mehran, J. Finan. Intermedation 2012, 2; see also n 36-43 of this thesis for a discussion of these special features.
127 Fernandes et al, JBR 2018, 240; de Haan/Vlahu, J. Econ. Surv. 2016, 229.
128 de Haan/Vlahu, J. Econ. Surv. 2016, 265 et seq.

rate governance emerged in the early 1980s and gained particular momentum after global financial crisis of 2007-2009. Still, compared to the vast body of research available with regards to traditional corporate governance, empirical or theoretical research, which takes into account the unique characteristics of banks and the impact on their corporate governance remains underrepresented.[129] In addition, connections between academic research and regulatory activities remain scant.[130] This is problematic, as just imposing general corporate governance without taking into account industrial differences might not only be ineffective in improving governance but at worst even have unintended negative consequences.[131]

What has been established nevertheless, is the recognition that corporate governance must also act as a means to enable financial market supervisors and regulators to monitor the governance practices of banks in order to protect the interests of those who have an economic and social stake in these institutions.[132] How this is adopted from an international perspective will be presented in the following section. 46

C. Legal Perspective

1. "Prudential" Corporate Governance

The discussion around bank-specific corporate governance spans across both economic and legal spheres, often referred to as *bank (corporate) governance* or *(corporate) governance of banks*.[133] From a legal standpoint, this concept is typically examined under the umbrella of prudential regulation as an aspect of financial market supervision and regulation. The word *prudent* generally means "*sensible and careful, esp. in trying to avoid unnecessary risks*".[134] Prudential regulation encompasses oversight strategies including legislative, reg- 47

129 Hopt, EBOR 2021, 16; Ferrarini, ECGI 2017, 7; Ciancanelli/Reyes Gonzalez, 5; Adams/Mehran, J. Finan. Intermedation 2012, 2.

130 Hopt, ECGI 2013, 48.

131 Adams/Mehran, J. Finan. Intermedation 2012, 2.

132 Alexander, JBR 2006, 19; EU Commission, Green Paper 2010, 4; Hopt, EBOR 2021, 16.

133 For the usage from a primarily economist perspective see e.g. Fernandes et al, JBR 2018, 236; Hagendorff, Oxford Handbook Banking, 139; from a primarily legal perspective see e.g. Mülbert, ECGI 2010, who uses the latter terminology in the title and throughout the paper, e.g. 6; Hopt, EBOR 2021, 28, 31; Kokkinis, Corporate Governance Banks, n 1.01, Ferrarini, ECGI 2017, 11.

134 Garner, Black's Law Dictionary, 1482; Emmenegger, Prudentielle Corporate Governance, 11.

ulatory and soft-law rules aimed at ensuring the stability and soundness of financial institutions and the broader financial system and protecting depositors from incurring losses.[135] It aims to keep financial institutions safe and stable, guiding them through challenges and organising resolutions or restructurings when necessary. Thereby, the financial system in general should be fortified against shocks, whether from systemic events or individual bank failures.[136] In the present context, prudential corporate governance is viewed as an instrument of prudential regulation.[137] However, it's noteworthy that the term prudential corporate governance has not (yet) become a standard terminology in the field.[138] Even the BCBS' framework, the leading international guideline in this regard, is titled "Corporate Governance Principles for Banks", and thereby does not explicitly emphasise the prudential aspect in its title.[139]

48 Prudential corporate governance plays a vital role in facilitating effective supervision, setting proper incentives for its management, and enhancing market confidence. Sound corporate governance is thus seen as crucial in ensuring the safe and efficient operation of a bank. Theoretically, well-governed banks require less regulatory intervention.[140] Conversely, deficiencies in corporate governance can lead to widespread issues across the financial sector and the entire economy.[141] The use of corporate governance as an instrument to achieve goals of financial market supervision consequently influences the conceptual understanding of corporate governance in the banking context.[142]

135 Kokkinis, Corporate Law, 71; Cranston et al, 27.

136 Cranston et al, 31.

137 It is worth noting however that the relationship between prudential regulation and bank corporate governance and whether both constitute substitutes or supplements is sometimes subject to discussion, see Busch/Ferrarini/van Solinge, Governance of Financial Institutions, Chap. 1 n 1.25-1.30. Cheffins, Theor. Inq. Law 2015, 29 sees it as a "potential" substitute, with oversight of regulators arguably reducing the need for supervisory boards and shareholders to monitor management closely. Furthermore Ferrarini, ECGI 2017, 14-17, sees traditional corporate governance mechanisms such as requirements for boards as a complement, while aspects of compensation are seen as a substitute. Kokkinis/Miglionico, 230-233, acknowledge bank corporate governance as a tool of prudential regulation. See also see e.g. Mülbert, ECGI 2010, 21-26; Hopt, EBOR 2021, 18-21, or Alexander, JBR 2006, 17, who discuss the topic under the auspices of supervisory law and practice.

138 See Emmenegger, Handbuch Corporate Governance, n 2 who recognises corporate governance as a means of prudential regulation; also Emmenegger, Prudentielle Corporate Governance, 10.

139 Cf. BCBS, Guidelines 2015; see also fn 111 of this thesis for a brief definition of the BCBS.

140 Kokkinis, Corporate Law, 116.

141 Cranston et al, 93.

142 Emmenegger, Prudentielle Corporate Governance, 20; Emmenegger, Handbuch Corporate Governance, n 86.

The BCBS, in its 2015 guidelines assert that effective corporate governance is crucial to the proper functioning, not only of the banking sector, but also of the economy as a whole.[143] In this role, prudential corporate governance encompasses a framework regarding the banks' organisation and management.[144] This specificity stems from the unique features of the banking sector and the integration of corporate governance standards within regulatory frameworks.[145] Governance frameworks ought to account for the interests of a wide array of stakeholders, as well as the overall stability of the financial system.[146] Therefore, it is imperative for regulators to harmonise the varied interests of societal groups affected by bank operations while also diminishing the social costs stemming from mismanagement.[147] From a prudential viewpoint, corporate governance in banking is primarily concerned with ensuring that banks meet their obligations to depositors and debtholders.[148] 49

Even if corporate governance is instrumentalised as a means of financial market supervision, banks are (for the most part) private sector firms. They legitimately pursue economic self-interests, yet their healthy functioning is also a public interest, given their unique role in the economy.[149] Regulators' expectation to ensure the safety and soundness of banks is an objective which is not necessarily in the shareholders' best interest.[150] The focus on depositors is generally opposed to the shareholder-centric view, which can lead to potential tensions as it leads to a diverging pursuit of goals.[151] 50

143 BCBS, Guidelines 2015, n 1.
144 Emmenegger, Prudentielle Corporate Governance, 11; Kokkinis, Corporate Law, 116.
145 Emmenegger, Handbuch Corporate Governance, n 16; cf. also n 36 et seqq. of this thesis for a discussion of the unique features of banks.
146 EU Commission, Green Paper 2010, 2.
147 Alexander, JBR 2006, 18.
148 Mülbert, ECGI 2010, 2010, 24.
149 Mehran/Mollineaux, Annu. Rev. Financ. Econ. 2012, 218.
150 de Haan/Vlahu, J. Econ. Surv. 2016, 230.
151 Kokkinis, Corporate Governance Banks, n 1.35.

2. Basel Committee on Banking Supervision Guidelines Corporate Governance Principles for Banks

2.1. Setup

51 The Basel Committee on Banking Supervision (BCBS) is recognised as the world's leading authority in banking regulation and supervision.[152] It was one of the first institutions to codify minimum requirements for bank governance with its guidelines called "Corporate Governance Principles for Banks".[153]

52 The BCBS is not an international organisation in the context of international law. Its standards, categorised as soft law, only gain binding legal status upon incorporation into national legislations.[154] The corporate governance guidelines are also included in the Compendium of Standards of the Financial Stability Board (FSB). Thereby, members of the FSB are obliged to implement these standards.[155] Since 2013, the implementation of the principles has been actively monitored by the BCBS.[156] Whilst not established to create a new regulatory framework, the BCBS guidelines significantly aid in the international convergence of bank corporate governance frameworks.[157] Before the global financial crisis, BCBS principles aimed to provide broad supervisory guidance without pursuing detailed international harmonisation. However, post-crisis,

152 HOPT, EBOR 2021, 18; see also fn 111 of this thesis for a brief definition of the BCBS.

153 HOPT, ECGI 2013, 5.

154 FERRARINI, ECGI 2017, 14; CHIU/WILSON, 195; EMMENEGGER, Handbuch Corporate Governance, n 5; ARMOUR ET AL, 887. Soft law describes informal, non-binding agreements that play a significant role in the global regulatory framework. Unlike formal treaties, soft law is often preferred for international initiatives in fast-changing sectors due to its flexibility. It permits the assignment of rule-making responsibilities to specialised bodies, facilitating faster adaptation than what is possible with the renegotiation of treaties, see ARMOUR ET AL, 889.

155 BRÄNDLI, Finanzmarktaufsicht, § 2 n 57. The Financial Stability Board (FSB), established in 2009, is the key international body for the coordination of the global financial standard setting process and to promote global financial stability. It coordinates national financial authorities and international standard-setting bodies, identifies and responds to risks in the financial system, and sets policies to maintain stability and transparency within the international financial sector. The FSB operates through consensus among its members, which include G20 nations, additional countries, and financial institutions, without a formal legal mandate, see ARMOUR ET AL, 174 et seq., 887; CRANSTON ET AL, 22 for a detailed discussion.

156 EMMENEGGER, Handbuch Corporate Governance, n 8 with reference to art. 2e BCBS-Charter.

157 KOKKINIS, Corporate Governance Banks, n 1.67.

the BCBS Charter outlined an expectation of full implementation by its member states and internationally operating banks. Consequently, a formal implementation within set timeframes with a literal transposition into national legal frameworks, whenever feasible, is expected.[158] Hence, despite their qualification as soft law, their impact is not to be underestimated.[159]

The BCBS guidelines represent a long-standing commitment to promoting sound governance practices in banking organisations.[160] They emphasise the need for proportionality in implementation, taking into account factors such as a bank's size, complexity, risk profile, and economic significance. This approach allows for suitable adjustments for banks with lower risk profiles while maintaining vigilance over those with higher risk exposures.[161] Overall, these principles communicate the expectations towards banks in considerable detail.[162] 53

2.2. Evolution

The focus on the corporate governance of banks gained significant interest following the Asian crisis in 1997.[163] In response, the BCBS published its first edition of its guidelines called "Enhancing Corporate Governance for Banking Organisations" in 1999, aligning with the OECD principles released the same year.[164] Although the BCBS guidelines drew upon the OECD framework, they offered a more specific perspective, tailored to the banking sector.[165] 54

Following the corporate scandals of Enron and WorldCom, the BCBS published a revised version of its standards in 2006, which detailed the roles and responsibilities of the governing bodies.[166] Until this point, the focus of bank corporate governance was primarily on shareholder value maximisation, with the 55

158 Emmenegger, Handbuch Corporate Governance, n 5 et seq.

159 Albrecht, 177; see also n 154 herein for a brief definition of soft law.

160 Kokkinis, Corporate Governance Banks, n 1.66; Laeven, Annu. Rev. Financ. Econ. 2013, 77.

161 Ferrarini, ECGI 2017, 13; Hopt, EBOR 2021, 18; Emmenegger, Handbuch Corporate Governance, n 5.

162 Hopt, EBOR 2021, 19.

163 Mülbert, ECGI 2010, 5; Emmenegger, Handbuch Corporate Governance, n 1. The Asian crisis catalysed significant advancements in international financial regulation and constitutes one of the significant instances which ultimately led to today's international financial regulation architecture, see Brummer/Smallcomb, Oxford Handbook Financial Regulation, 142-144 for a detailed discussion.

164 Ferrarini, ECGI 2017, 10; Mülbert, ECGI 2010, 5.

165 Emmenegger, Handbuch Corporate Governance, n 16.

166 Ferrarini, ECGI 2017, 7; Emmenegger, Handbuch Corporate Governance, n 11.

assumption that specific banking issues would be addressed through financial regulation. Consequently, prudential corporate governance during this period did not significantly diverge from mainstream corporate governance frameworks.[167]

56 The global financial crisis of 2007-2009, as a multi-causal result from various economic developments and regulatory frameworks, triggered a major shift in this approach.[168] The crisis led to a heightened focus on the specific corporate governance of banks and other financial institutions.[169] Commonly, failures of banks were attributed to poor corporate governance and shortcomings in prudential regulation, highlighting internal deficiencies in the relationship between principals (shareholders or creditors) and agents (managers).[170] Key issues identified included risk management, compensation incentives, board composition and competence, and the effectiveness of checks and balances.[171] The crisis revealed that contradictory remuneration schemes, insufficient risk management practices, and inadequate board oversight contributed to these governance breakdowns, leading to a global push for reforms in corporate governance frameworks.[172]

57 In response to these developments, the BCBS revised its guidelines in 2010, following an update to the OECD framework.[173] This revision expanded the guidelines from eight to fourteen principles, with a sharpened focus on risk management.[174] The differentiation from the OECD principles were in specific

167 Armour, Oxford Handbook Corporate Governance 1109, 1113; Hopt, ECGI 2013, 5.

168 Kokkinis, Corporate Law, 115; Emmenegger/Kurzbein, GesKR 2010, 463. The global financial crisis of 2007-2009, precipitated by the US housing market collapse and subsequent global exposure to toxic assets, revealed significant weaknesses in both national and international financial regulations. This led to enhanced global coordination, with the G20 assuming a central role in economic governance and the Financial Stability Forum transforming into the Financial Stability Board for more effective oversight. It also led to large-scale international regulatory reforms, whereas today's international financial architecture and regulatory setups are mostly shaped by the revisions after this crisis, see Brummer/Smallcomb, Oxford Handbook Financial Regulation, 144-147. For an analysis of the causes of the global financial crisis (from a regulatory perspective), see De Larosière et al, EU Report 2009, 7-12; for a discussion of the bank failures see Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 439-444.

169 Emmenegger/Kurzbein, GesKR 2010, 474.

170 Armour, Oxford Handbook Corporate Governance, 1108.

171 Emmenegger/Kurzbein, GesKR 2010, 463-465.

172 Kirkpatrick, OECD Journal 2009, 62; De Larosière et al, EU Report 2009, 12, 29; EU Commission, Green Paper 2010, 2; Tricker, 22 et seq.

173 Kokkinis, Corporate Law, 115; Ferrarini, ECGI 2017, 10; Emmenegger, Prudentielle Corporate Governance, 11.

174 Emmenegger/Kurzbein, GesKR 2010, 465 et seq.

requirements like establishing board risk committees, appointing a Chief Risk Officer (CRO), and scrutinising new products and mergers.[175] It was also this revision which prompted the shift from providing broad supervisory guidance to the expectation of full implementation by its member states and internationally operating banks.[176]

58 The effectiveness of the 2010 guidelines was assessed in a 2013 FSB peer review on risk governance. The review found a need for enhanced authority and called for national supervisors to improve their capacity to assess banks' risk governance and culture, as well as the frequency of their engagement with the board and to strengthen the independence of the CRO role in banks, which consequently constituted some of the main topics of the guidelines' reform.[177] Also, the need was identified to delineate the specific roles of the board of directors including its risk committees, the executive management and the control functions and to strengthen banks' overall checks and balances.[178] In light of these findings and ongoing developments in corporate governance, the BCBS published its latest version of the guidelines in 2015, which remains in force today.[179] In its present version, the guidelines aim to foster a culture of honesty and accountability, reinforcing the importance of ethical conduct and protecting the interests of customers and shareholders alike. Collectively, these developments reflect a dynamic and evolving landscape in bank corporate governance, emphasising a balanced approach to protecting the interests of various stakeholders.[180]

2.3. Overview and Cornerstones

59 In today's version, published in 2015, the BCBS guidelines provide a comprehensive framework for corporate governance in banks from a prudential perspective. These guidelines define corporate governance as determining "[...]

175 Conley et al., Cornell Int. Law J. 2019, 775 et seq.; Winter, Oxford Handbook Corporate Governance, 169.

176 Emmenegger, Handbuch Corporate Governance, n 5 et seq.

177 Cranston et al., 98. The peer review mechanism describes the system where a team of multinational regulators from various FSB member states examines and evaluates the implementation of relevant protocols by different countries. These reviewers, being independent of domestic political and industrial influences, offer an unbiased assessment. This method is seen as a potentially effective tool for facilitating regulatory changes, see Armour et al., 175.

178 Hodges, 631.

179 Emmenegger, Handbuch Corporate Governance, n 13.

180 Cranston et al., 99.

the allocation of authority and responsibility by which the business and affairs of a bank are carried out by its board and senior management […]".[181] Within its bank-specific framework, the BCBS refers to the OECD's definition of corporate governance, and complements it by stating that corporate governance aids in defining the way authority and responsibility are allocated and how corporate decisions are made.[182] A fundamental principle of the BCBS's guidelines is the primacy of depositor interests.[183] Depositor protection is positioned as the central aspect of bank corporate governance, prioritising depositors' interests over shareholders'. The guidelines stipulate that banks must *actively safeguard depositor interests*, contrasting with the mere *fulfilment of duties* towards shareholders.[184]

60 Consequently, this guideline encompasses the prudential requirements for financial institutions focused on banks' organisation and management. The specificity of this governance approach arises from the unique characteristics of the banking sector and from the adoption of corporate governance requirements for regulatory purposes.[185] The focus of the BCBS principles is not only to resolve classic principal-agent conflicts but rather to guide banks in establishing a corporate governance system which primarily serves depositors interests.[186]

61 In its current version from July 2015, the guidelines set forth 13 major principles related to bank corporate governance.[187] These principles primarily focus on ensuring effective boards, sound risk management, appropriate executive remuneration, simplification of group structures, and transparency.[188] There is a strong emphasis on *risk management*, a topic which has gained prominence

181 BCBS, Guidelines 2015, n 3.

182 BCBS, Guidelines 2015, n 4; see n 24 et seq. herein for the subsequent definition of the OECD.

183 Hopt, ECGI 2013, 5.

184 Emmenegger, Prudentielle Corporate Governance, 19; BCBS, Guidelines 2015, n 2, 19; see also n 22, 30, 33, 40 herein for a discussion of the main focus on shareholder interest in general corporate governance.

185 Mülbert, ECGI 2010, ECGI 2010, 21; Emmenegger, Handbuch Corporate Governance, n 16.

186 Albrecht, 174.

187 Hopt, EBOR 2021, 18. The principles cover 1. The overall responsibilities of boards; 2. Board qualification and composition; 3. The structure and practices of boards; 4. Senior management; 5. Governance and group structures; 6. Risk management functions; 7. Risk identification, monitoring and control; 8. Risk communication; 9. Compliance; 10. Internal audits; 11. Compensation; 12. Disclosure and transparency and 13. The role of supervisors; see BCBS, Guidelines 2015, p. 8-40.

188 Kokkinis, Corporate Governance Banks, n 1.66.

post-global financial crisis.[189] The principles consequently highlight the importance of risk culture, risk appetite, and their correlation to the risk competence of the bank.[190] In addition, compensation systems are seen as a crucial part of the governance and incentive structure, aiding in the communication of acceptable risk behaviours and strengthening internal risk culture.[191] Moreover, guidelines are set forth regarding the governance of *group structures* and the importance of internal control functions is underscored, such as the *compliance and internal audit*, which are under the board's purview and require direct reporting lines to it. The guidelines also address the issue of high *compensation* and remuneration based on inappropriate incentives, outlining key elements of such practices. Additionally, the principles include *transparency and disclosure* as essential components, ensuring that shareholders, depositors, and other stakeholders can adequately assess the management and control of the bank.[192]

The primary responsibility for implementing and monitoring corporate governance lies with the banks, specifically their senior management, as well as the shareholders. However, supervisory authorities also play a crucial role in the effective and successful implementation of these frameworks. These authorities are responsible for monitoring the adherence to the respective provisions, regularly assessing and evaluating the management and control mechanisms within banking institutions.[193] 62

While there are similarities with the corporate law framework applicable to all public companies, the BCBS guidelines also exhibit distinct differences. These include a focus on binding regulatory rules aimed at safeguarding systemic stability rather than solely maximising shareholder value. However, some critics question the extent to which the BCBS guidelines are truly bank-specific, noting that they may still be heavily influenced by traditional corporate law, emphasising shareholder empowerment and value maximisation. Despite acknowledging the primacy of depositor interests, it is argued that these principles do not adequately differentiate bank-specific conflicts of interest or fundamentally alter power structures within the banking sector.[194] 63

189 Ferrarini, ECGI 2017, 10; Becht/Bolton/Röell, Ox. Rev. Econ. Policy 2011, 438; Laeven, Annu. Rev. Financ. Econ. 2013, 77.

190 Emmenegger, Handbuch Corporate Governance, n 13; cf. BCBS, Guidelines 2015, principles 6-8.

191 Emmenegger, Handbuch Corporate Governance, n 14.

192 Albrecht, 177; cf. BCBS, Guidelines 2015, principles 5, 9-12.

193 Albrecht, 175 et seq.

194 Kokkinis, Corporate Law, 114; Laeven, Annu. Rev. Financ. Econ. 2013, 77.

2.4. The Role of Senior Management

2.4.1. *Definition of Senior Management in the Present Context*

64 The concept of senior management lacks a universal definition. Its interpretation hinges on the legal framework particular to each jurisdiction and the corporate structure of a bank, especially in view of the possibility of a one-tier or two-tier board approach.[195] The terminology *management* (or manager) itself is a very broad term and can pertain to leadership functions across all hierarchical levels of a firm.[196] The word *senior* implies a level of seniority and thereby a certain hierarchical rank of an individual within an institution. However, to what rank this really pertains to is not universally understood.

65 Taking into consideration that jurisdictional differences that exist due to the varying governance structures and not advocating for a certain board structure, the BCBS assumes a one-tier board perspective and uses the term senior management to refer to the executive board (whilst board of directors is used to refer to the supervisory body).[197] Others understand senior management simply as natural persons holding a high-level executive position in a financial institution, while not being members of the management body itself.[198]

66 For reasons of simplicity and clarity, the present work adopts a broad interpretation of *senior management* to collectively include both the supervisory board and executive management, in line with a two-tier structure. If distinctive aspects of the separate bodies are discussed, it will be referred to as the *board of directors* (also: supervisory board or supervisory body) for the oversight body. As a general point of reference, the board of directors formulates the strategic objectives of a firm and supervises the executive management execution of such. The *executive board* (also: executive management or executive body) refers to the operative body. It manages the firm's day-to-day busi-

195 In a unitary board (also: one-tier) system, prevalent in e.g. Anglo-Saxon countries, a single board of directors is responsible for both the strategic direction and day-to-day management of a company. This board typically includes both executive (company management) and non-executive (independent) directors. On the other hand, a dual board (two-tier) system, prevalent in e.g. continental Europe, separates these functions into two distinct boards: the supervisory board and the management board. See BAINBRIDGE, Oxford Handbook Corporate Governance, 276-289 for a thorough discussion of both systems. As will be elaborated later, for Swiss banks a dual board system is established, see n 149, 183 et seq. herein for a detailed discussion.

196 MOORE/PETRIN, 17.

197 BCBS, Guidelines 2015, n 18 et seq.

198 BUSCH/PALM-STEYERBERG, Governance of Financial Institutions, Chap. 8 n 8.07.

ness operations and ensures that the firm's high-level strategic objectives are successfully executed.[199] In the present context the term senior management is analogous to the term governing body or corporate body. Any jurisdiction-induced necessary nuances in understanding senior management will be addressed as relevant to the particular context under discussion.

2.4.2. *Relevance*

The significance of senior management in prudential corporate governance, including their personal attributes, has been emphasised since their initial version from 1999. Since then, the principles have been assigning the primary responsibility for corporate governance to the board of directors, underscoring the central role of this body in the framework.[200] In addition, already in 1999, the BCBS guidelines stipulated that key personnel must be fit and proper for their roles, although initially the guidelines did not specify the criteria for this requirement. Over time, this requirement has been elaborated in more detail and today it remains a cornerstone of the guidelines.[201] 67

In the current version, the definition of corporate governance already indicates the relevance of the senior management, as accordingly, corporate governance is seen a means to determine the allocation of authority and responsibilities by which a bank's business and affairs are carried out through its governing bodies.[202] Moreover, the focus on the senior management of prudential corporate governance involves intricately detailing critical aspects of management and control, as well as the internal structures of the bank.[203] 68

199 Moore/Petrin, 17 et seq.

200 BCBS, Guidelines 1999, n 28; BCBS, Guidelines 2015, n 157. Initially the responsibility was *good* corporate governance, whereas today responsibility is just governance.

201 BCBS, Guidelines 2015, n 161, n 51 et seq. lays out the subsequent qualifications. "Fit and proper" is a widely established terminology in the context of competence and character of members of governing bodies of banks (or financial institutions). While there is no set international framework, generally speaking, in most jurisdictions the fitness criteria assesses whether a person has enough expertise, practical experience and assesses potential conflicts of interest. Under the propriety criteria an individual's past conduct is assessed. For example, it is considered whether the person has been convicted of a crime relating to dishonesty or integrity or declared bankrupt, see Blinco et al, FSI Insights 2020, n 34 et seq. for a discussion of the concept. Moreover, see Resti, EU Analysis 2020, 13-18 for an overview on the EU rules on fit and proper requirements. For the Swiss understanding of these requirements see n 151, 192–205 of this thesis.

202 BCBS, Guidelines 2015, n 3.

203 Emmenegger, Prudentielle Corporate Governance, 20; Hopt, EBOR 2021, 18; Laeven, Annu. Rev. Financ. Econ. 2013, 77.

While this emphasis generally aligns with traditional understanding of corporate governance, the BCBS principles introduce more specific requirements. The prevailing idea of these principles is to ensure that senior management in each bank is actively pursuing good governance practices. This is achieved by delineating the distinct roles of the supervisory board and executive management, thereby enhancing the bank's overall checks and balances system.[204] Today, four out of the total thirteen principles directly address senior management, and they amount to approximately half of the guidelines' content.[205] These principles are primarily concerned with the structure, organisation, expectations, and allocation of responsibilities, focusing particularly on supervisory boards but also encompassing executive management.[206] As will be further elucidated in the following, the guidelines clearly acknowledge the reciprocal influence of senior management and prudential corporate governance. The principles do not only impose requirements on these individuals through the framework but also clearly acknowledge the senior management's responsibility for its successful implementation.

2.4.3. *Outline of Requirements*

69 With regards to the *board of directors*, the guidelines mainly set forth the relevant provisions in principles 1-3. Accordingly, the overall responsibility of the bank is attributed to this body. This includes the responsibility for the governance framework, corporate culture and the approval and oversight of management's execution of the bank's strategic objectives.[207] For example, it is required that this board establishes the organisational structure which enables senior management to carry out their responsibilities and facilitate effective decision-making and good governance.[208] In addition, this body must install a code of conduct (or code of ethics) and plays a lead role in establishing the

204 Cranston et al, 99.

205 Cf. BCBS, Guidelines 2015, where the principles range from n 23-156, whereof n 23-94 concern the principles which directly address senior management.

206 BCBS, Guidelines 2015, see e.g. principles 1-3 which are dedicated to boards and principle 4 to senior management, yet the importance of both bodies is highlighted by the continuous mentioning throughout the guidelines.

207 Cf. BCBS, Guidelines 2015, 2015, principle 1 "Board's overall responsibilities". The overall responsibilities of the board are then more are detailed (n 23-28); as well as its role in corporate culture and values (n 29-32); in the banks risk appetite, management and control (n 33-44) and in the oversight of the executive management (n 45-46).

208 BCBS, Guidelines 2015, n 23.

bank's corporate culture and values.[209] Furthermore, it is required that the board of directors selects the members of the executive board and that it holds these members accountable for their actions.[210]

Moreover, fit and proper requirements are set forward for the supervisory body. These highlight the importance of its *qualifications* and *composition* and require the supervisory body to be qualified both individually and collectively. The individuals' qualifications should enable a deep understanding of their oversight and corporate governance roles, allowing them to exercise sound and objective judgment regarding the bank's affairs.[211] For example, it is required that a bank's board is composed of diverse individuals with a balanced mix of skills and expertise, tailored to the bank's size, complexity, and risk profile. Additionally, the principles emphasise the need for board members to possess attitudes that promote effective communication, collaboration, and critical debate in decision-making.[212] 70

The guidelines also set forward requirements regarding the *board of director's own structure and practice*. Consequently, it must define suitable governance structures and practices for its own operations. The board of directors is required to establish mechanisms to ensure adherence to these practices and periodically review them for ongoing effectiveness.[213] Accordingly, it sets forth requirements concerning the organisation and assessment of the board; the role of the chair of the board; the committees (board, audit, risk, compensation and other committees); and the handling of conflicts of interest.[214] 71

Regarding the *executive management*, the principles underscore the role of this body under the board of director's direction and oversight. It is tasked with executing and overseeing the bank's activities in alignment with the board-approved business strategy, risk appetite, remuneration, and other policies.[215] It is *inter alia* held that the executive management is responsible to the board of directors for the sound and prudent day-to-day management of the bank.[216] Moreover, the executive body should substantially contribute to a 72

209 BCBS, Guidelines 2015, n 25, 30.
210 BCBS, Guidelines 2015, n 45 et seq.
211 Cf. BCB, Guidelines 2015, principle 2 "Board qualifications and composition", n 47-49, 161.
212 BCBS, Guidelines 2015, n 48, 49.
213 Cf. BCBS, Guidelines 2015, principle 3 "Board's own structure and practices".
214 Cf. BCBS, Guidelines 2015, n 57-86; or more specifically regarding the organisation and assessment of the board n 57-60; the role of the chair n 61-62; the committees n 63-79; and the handling of conflicts of interest n 80-86.
215 Cf. BCBS, principle 4 "Senior management".
216 Cf. BCBS, Guidelines 2015, n 87.

bank's sound corporate governance through personal conduct.[217] Similar as for the board, it is set forth that the members are fit and proper for their positions.[218]

73 Lastly, the guidelines also foresee principles regarding the role of supervisors, which include how the supervisory authority should approach senior management.[219] For example, it is required that the authority should provide guidance on their expectations of checks and balances, clear allocation of responsibilities and accountability among the members of the governing bodies.[220] In addition, the authority is held to assess whether the bank has in place effective mechanisms through which the governing bodies execute their responsibilities, as well as evaluate the banks' governance effectiveness and have regular interaction with them.[221] With regards to fitness and propriety, supervisors are mandated to evaluate the processes and criteria used by banks to select members of the supervisory and executive board, and if necessary obtain information about the expertise and character of those individuals, highlighting the need for ongoing supervisory attention.[222] However it is not required that there is a formal regulatory approval process by the supervisory authority for individuals.[223]

217 Cf. BCBS, Guidelines 2015, n 91.
218 Cf. BCBS, Guidelines 2015, n 89 et seq., 161.
219 Cf. BCBS, Guidelines 2015, principle 13 "The role of supervisors".
220 Cf. BCBS, Guidelines 2015, n 158.
221 Cf. BCBS, Guidelines 2015, n 160, 162, 164.
222 BCBS, Guidelines 2015, n 161; it is therein referred to principle 2 of the guidelines as the relevant fit and proper criteria.
223 Blinco et al, FSI Insights 2020, n 25, 27, 29.

II. Senior Management and Prudential Corporate Governance in the Post-GFC Era

A. Continued Challenges

1. Persistent Corporate Governance Issues

74 Departing from elaboration of the current international framework of prudential corporate governance, the focus now shifts to exploring its practical impact and the perceived role of senior management in the post-global financial crisis (GFC) era. In the aftermath of the global financial crisis of 2007-2009, regulators around the world were equipped with a plethora of tools to prevent similar occurrences or mitigate their destabilising effects.[224] Initially, efforts were directed at quantifiable changes in financial systems, focusing on technical regulations covering bank capitalisation, liquidity, deposit insurance, insolvency laws, stress tests, disclosure, reporting, and executive pay.[225] As indicated previously, these initial responses included the expansion and sophistication of prudential corporate governance frameworks.[226] Institutions were the primary addressees of these policy responses. In this strategy, banking regulators tackled emerging financial vulnerabilities, potentially related to individual illegal or unethical actions, by reinforcing existing regulatory requirements for banks. By doing so, they aimed to bolster the institutions' resilience to withstand shocks, rather than directly addressing individual actions.[227]

75 Despite these interventions and efforts to enhance governance in financial institutions, a series of high-profile cases like LIBOR rigging, forex manipulation, tax evasion, and money laundering continued to emerge in the post-global financial crisis setup.[228] In fact, this era was marked by an unprecedented in-

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224 ZARING, Seattle U. Law Rev. 2020, 555; LLEWELLYN, Oxford Handbook Central Banking, 509.

225 CONLEY ET AL, Cornell Int. Law J. 2019, 775; BERGER/MOLYNEUX/WILSON, Oxford Handbook Banking, 2; OMAROVA, Cornell J. Law Public Policy 2018, 803; KHAN, IMF Working Paper 2018, 5.

226 CONLEY ET AL, Cornell Int. Law J. 2019, 775 et seq.; WINTER, Oxford Handbook Corporate Governance, 169; see also n 56 of this thesis.

227 PAGLIARI/KOVRAS, City University of London Working Paper 2021, 13 et seq.

228 FSB, Stocktake 2017, 1; LLEWELLYN, Oxford Handbook Central Banking, 520; HELD/NOONE, Seattle U. Law Rev. 2020, 716; HAGENDORFF, Oxford Handbook Banking, 133; WALKER, Seattle

crease in such misconduct, resulting in the characterisation of this time as a "crisis of conduct".[229] Banks faced the most significant issues, with reports from the global financial crisis until the year 2020 showing that the 50 largest European and US banks paid fines totalling approximately USD 394 billion.[230] The increasingly high amounts of penalties imposed indicated that such had evolved to become an operational cost rather than an effective deterrent, which would constitute the primary aim of this measure.[231]

76 These occurrences can have wide-reaching implications, including legal and financial ramifications.[232] Such extend to potentially harming firms, stakeholders, shareholders, and the broader economy. For firms, it leads to resource consumption due to internal investigations, controls, and penalties, which deplete a bank's capacities and damage profitability, along with damage to the institution's public reputation.[233] Shareholders are generally considered the ultimate bearers of fines imposed on the institution, as they consequently face diminished returns. In turn, they might refrain from future investments.[234] Stakeholders, including bank clients, might be a direct target of the misconduct, e.g. through mis-selling practices. Not only do they potentially incur a financial loss, but also subsequently lose trust, potentially shifting business away from traditional financial services.[235] Such instances also have detrimental effects on the trust and confidence in the financial industry as whole, a critical element for proper market functioning, which may lead to increased

U. Law Rev. 2020, 723; Zhu/Ferrarini, Governance of Financial Institutions, Chap. 16 n 16.01; Musalem, Culture and Ethics in Banking, 17; Dudley, FRBNY Enhancing Financial Stability 2014, 1; Enria, ECB Culture and Governance 2019; Nouy, ECB Ethics in Banking 2018, 1 et seq.

229 Coen, BCBS Looking Ahead 2018, 4.

230 Grasshoff et al, BCG Report 2021, 2021, 6; the report sources the data from annual and press reports, as well as its own analysis. The US regulators were the most active during that period.

231 Lagarde, IMF Accountability 2015.

232 FSB, Stocktake 2017, 1; ESRB, Misconduct Report 2015, 219; Musalem, Culture and Ethics in Banking, 18; G30, Report Conduct and Culture 2015, 5.

233 Held/Noone, Seattle U. Law Rev. 2020, 689, 695; Chaly et al, FRBNY White Paper 2017, 3; G30, Report Conduct and Culture 2015, 11; Hagendorff, 145. See also ESRB, Misconduct Report 2015, 16 where it is estimated that the reputational penalty is 7.5 times the total amount of the effective financial penalty imposed.

234 ESRB, Misconduct Report 2015, 11; Held/Noone, Seattle U. Law Rev. 2020, 698, 714; Chaly et al, FRBNY White Paper 2017, 3; see also Benninger/Zulauf, Finanzmarktenforcement, 472 et seq., who share a similar view, as well as Nobel, FS von der Crone, 639 who also sees an issue in the fact shareholders ultimately bear the consequences of fines imposed on the institutions.

235 Walker, Seattle U. Law Rev. 2020, 723.

costs of intermediation and hinder the flow of financial services.[236] For the financial system, misconduct poses risks to financial markets, threatening stability and efficiency.[237]

2. Limits of Frameworks

These cases of misconduct are indicative of classic corporate governance issues in affected institutions, manifesting in various, interconnected ways. The roots often lie in principal-agent problems, given misaligned incentives, where the actions of individuals diverge from the broader interests of management or shareholders.[238] Weaknesses in ownership and control setups allow employees to act in ways which fail to deliver productive societal outcomes.[239] With regard to misaligned incentives, individuals within these institutions might prioritise short-term gains, such as maximising immediate bonuses or quarterly profits, over the long-term welfare of the bank.[240] Scenarios in which banks are held liable for misconduct while management profits from it can further incentivise unethical behaviour.[241] Another prevalent issue is the presence of moral hazard, particularly in systemically important banks, according to which the senior management might assume that the significance of the institution shields them from bankruptcy or substantial fines, given the broader economic consequences such might bear.[242] 77

Hence, the persisting instances of misconduct were considered to signal weaknesses in governance frameworks and to reflect inadequacies in corporate culture, accountability, and ethical conduct.[243] The mounting fines and 78

236 ESRB, Misconduct Report 2015, 6; Held/Noone, Seattle U. Law Rev. 2020, 684; Chaly et al, FRBNY White Paper 2017, 3; Dudley, FRBNY Improving Culture 2017, 1. See also Thakor, IJCB 2021, 54; G30, Report Conduct and Culture 2015, 19. Cohn/Fehr/Maréchal, Nature 2014, 86, 88, researched the reputation of the banking industry and their employees. Concluding their study conducted in 2014 the authors found that bank employees were considered the most dishonest group of people when compared to physicians, the general population and prison inmates.

237 Chaly et al, FRBNY White Paper 2017, 3; Cohn/Fehr/Maréchal, Nature 2014, 86, with further references.

238 ESRB, Misconduct Report 2015, 9; Dudley, FRBNY Worthy of Trust 2017, 1; Chaly et al, FRBNY White Paper 2017, 8. For a general discussion of the issues discussed in this section see n 33 et seq. herein.

239 Arsalidou, 14.

240 ESRB, Misconduct Report 2015, 9; Dudley, FRBNY Worthy of Trust 2017, 1.

241 ESRB, Misconduct Report 2015, 11.

242 ESRB, Misconduct Report 2015, 9; Dudley, FRBNY Worthy of Trust 2017, 1.

243 FSB, Stocktake 2017, 1; Williams, FRBNY Banking Culture 2018.

continuous corporate scandals indicated systemic issues, not just outcomes of a few "bad apples".[244] It was found that frequently many employees and managers in affected institutions were complicit, encouraged misconduct, or simply ignored troubling behaviour, suggesting an organisational breakdown.[245]

79 The corporate governance frameworks set up after the global financial crisis consequently seemed insufficient in preventing bank operational failures, with poorly designed or implemented frameworks contributing to misconduct risk.[246] This raised questions about the efficacy of statutes and regulations.[247] In addition, it was questioned whether long-established fit and proper requirements were suitable for modern banking challenges.[248] Given the societal costs and threats to financial stability of these instances, addressing these issues became imperative.[249]

80 Interestingly, it was only several years post-global financial crisis that the discussions about the roles of individual behaviour, conduct, and culture in potentially contributing to this event increased. Corporate culture failures and weaknesses in corporate governance were being identified as key factors in the unethical or irresponsible behaviours that exacerbated the crisis.[250] The roles and accountability of senior executives were critically examined, acknowledging that financial crises are not merely random events but are often driven by the actions of individuals and institutions within established legal and regulatory frameworks.[251] Ongoing scandals further accelerated the discussion, highlighting persisting issues in corporate culture, specifically a lack of accountability and ethical conduct, which were seen as the primary reasons for these misconduct incidents.[252]

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244 Thakor, FRBNY Economic Policy Review 2016, 5; Walker, Seattle U. Law Rev. 2020, 724; Hagendorff, Oxford Handbook Banking, 133.

245 Chaly et al, FRBNY White Paper 2017, 4.

246 Hagendorff, Oxford Handbook Banking, 133; Zhu/Ferrarini, Governance of Financial Institutions, Chap. 16 n 16.02; Bossu/Chew, IMF Working Paper 2015, 23; FSB, Toolkit 2018, 9.

247 Held/Noone, Seattle U. Law Rev. 2020, 691.

248 Nouy, ECB Ethics in Banking 2018, 2.

249 ESRB, Misconduct Report 2015, 23; Dudley, FRBNY Worthy of Trust 2017, 2.

250 Awrey/Blair/Kershaw, Del. J. Corp. Law 2013, 218; Thakor, IJCB 2021, 47; Khan, IMF Working Paper 2018, 5; Coen, BCBS Looking Ahead 2018, 4; Winter, Oxford Handbook Corporate Governance, 169; Pagliari/Kovras, City University of London Working Paper 2021, 1, 14; Nouy, ECB Good Governance 2018.

251 Zhu/Ferrarini, Governance of Financial Institutions, Chap. 16 n 16.02; Bailey, PRA Governance 2015, 2; Mehran/Mollineaux, Annu. Rev. Financ. Econ. 2012, 216.

252 Williams, FRBNY Banking Culture 2018.

In the post-global financial crisis setup, governance focused on structures and procedural compliance. Making such processes look well implemented on paper, while in reality they are not, is considerably easy. A mere box-ticking approach falls short in ensuring true effectiveness.[253] Moreover, the most sophisticated and technically detailed regulatory requirements will not succeed in achieving their goals if the rules are being circumvented by the individuals within it.[254] 81

B. Regulatory Shift

1. Reception of Persisting Issues

Initially, the focus on individuals in bank corporate governance frameworks was primarily on the board of directors, emphasising their collective suitability rather than individual traits.[255] However, in the post-global financial crisis era this perspective broadened and it has been increasingly recognised that the effectiveness of corporate governance frameworks hinges on the behaviour of the individuals within it. Dysfunctional behaviour was found to undermine governance effectiveness, highlighting that misconduct often stems from poor decisions made within the framework.[256] Human behaviour was considered a key factor in these scandals, emphasising the need to address behaviours likely to harm the business.[257] The primary responsibility lays with the banks and the individuals managing and controlling them, particularly the senior management, necessitating close attention to their governance and culture.[258] Eventually the role of individual employees of these institutions entered the international regulatory agenda and subsequent discussions.[259] 82

One common denominator of these discussions is the *individual responsibility and accountability* of employees of banks, and more specifically the senior management. It is acknowledged that the primary responsibility for misconduct in financial institutions rests with the entities and their managing indi- 83

253 Gleeson, Culture and Ethics in Banking, 55 et seq.
254 Omarova, Cornell J. Law Public Policy 2018, 804; Zhu/Ferrarini, Governance of Financial Institutions, Chap. 16 n 16.01 et seq.
255 Hagendorff, Oxford Handbook Banking, 148; Resti, EU Analysis 2020, 12.
256 G30, Report Conduct and Culture 2015, 19, 30; Enria, ECB Culture and Governance 2019.
257 Lo, FRBNY Economic Policy Review 2016, 36.
258 Hayne, Australian Misconduct Report 2019, 4.
259 Pagliari/Kovras, City University of London Working Paper 2021, 14.

viduals, necessitating close scrutiny of their governance.[260] The complexity in banking can lead to a diffusion of responsibility, complicating accountability in misconduct cases involving numerous individuals.[261] For instance, in the aftermath of the global financial crisis, there was a notable lack of accountability among individuals for their actions, a trend that continued through subsequent cycles of misconduct cases.[262] Despite the significant role and impact of senior management in corporate governance failures, they were rarely held accountable.[263] Generally, even in the face of clear evidence of wrongdoing, it mostly were the corporate balance sheets depleted by fines that bore the legal sanctions for reckless behaviour, rather than the involved individuals.[264] This situation fostered a culture of impunity, as the perception prevailed that the likelihood of facing consequences was low.[265] Effective governance is vital for curbing unethical behaviour and excessive risk-taking and should promote accountability. Therefore, enhancing corporate governance frameworks was seen as one possible approach to influence behaviour and mitigate misconduct risk.[266] Consequently, the herein discussed issues led supervisory authorities to explore ways to hold individuals accountable for their actions.[267] Hence, individual accountability has been identified as a pivotal mechanism for industry resilience and public trust, which led legislators to seek ways of holding senior bank managers accountable for future failings.[268]

84 Another topic that emerged was the *culture and conduct* of banks and the industry. It was found that the high-profile misconduct cases revealed a systemic issue with the culture of banks. This revelation has led regulators to increasingly focus on scrutinising firms' cultures, recognising that a robust formal governance structure can be undermined by prevailing cultural norms.[269] There is a growing

260 Hayne, Australian Misconduct Report 2019, 4.

261 Parajon Skinner, Fordham Law Rev. 2016, 1578 et seq.

262 Pagliari/Kovras, City University of London Working Paper 2021, 5; McGrath, Seattle U. Law Rev. 2020, 547-551; Wheatley 3/2015.

263 Bossu/Chew, IMF Working Paper 2015, 23.

264 Lagarde, IMF Accountability 2015.

265 Shafik, BoE Ethical Lift 2016, 2.

266 FSB, Toolkit 2018, v, 1; Bossu/Chew, IMF Working Paper 2015, 23; Lagarde, IMF Accountability 2015; Nouy, ECB Ethics in Banking 2018, 2.

267 FSB, Toolkit 2018, 22 et seq. According to the cited source, *accountability* describes the scenario where an individual can be held to account for outcomes in the area of the persons responsibility. *Responsibility* is used broadly in this regard and does not imply any particular form of liability attached to an individual undertaking a role or function.

268 McCalman/Young/Chan, JIBLR 2017, 261; Wheatley 3/2015.

269 Walker, Seattle U. Law Rev. 2020, 724 et seq.; Chaly et al, FRBNY White Paper 2017, 5, 12; Llewellyn, Oxford Handbook Central Banking, 520, 523; Zhu/Ferrarini, Governance of Fi-

acknowledgment that the banking sector's effectiveness and soundness depend as much on cultural standards as on formal rules.[270] Given the impracticality and enormous cost of codifying every possible ethical dilemma an employee might face, a bank's culture can serve as a vital coordination mechanism for guiding behaviour.[271] The culture within a bank, shaped by those who manage it, can significantly influence the behaviour of the entire organisation.[272] Establishing a culture where ethical behaviour is rewarded and lapses are not tolerated requires strong leadership and subsequent tone at the top of the institution.[273]

Globally, central banks and other regulatory and supervisory bodies have started to adopt varied approaches to address cultural issues within banks.[274] Recognising the significant impact of culture on individual behaviour in banks, regulators and supervisors have broadened their focus to include these *softer* aspects of corporate governance. They identified their crucial role in promoting robust internal practices and a healthy culture as a means of enhancing banking stability.[275] It is generally understood that while regulation cannot determine or prescribe the culture of a bank or the industry, it can still have an important influence.[276] This shift in focus goes beyond traditional rule-making, emphasising the importance of voluntary compliance with both the letter and spirit of governance.[277] Encouraging a cultural environment where ethical behaviour is the norm, even in the absence of oversight, has become a priority.[278] In their initiatives, many regulators have sought to promote specific personal characteristics among members of the governing bodies, aligning these efforts

85

nancial Institutions, Chap. 16 n 16.04. Culture in general is an extremely broad concept. The discussion herein mostly pertains to firm or organisational culture. Building on the FSB, Stocktake 2017, 71-73 sample of definitions, for the present context it can be understood as collective values, beliefs, norms, and practices that define an organisation. It influences how the organisation's members perceive, think, and behave, guiding their approach to addressing the corporation's challenges. For a detailed discussion of the concept see ZHU/FERRARINI, Governance of Financial Institutions, Chap. 16 n 16.12-16.27.

270 ZHU/FERRARINI, Governance of Financial Institutions, Chap. 16 n 16.01 et seq.

271 THAKOR, IJCB 2021, 61.

272 ZHU/FERRARINI, Governance of Financial Institutions, Chap. 16 n 16.02, 16.29; NOUY, ECB Ethics in Banking 2018, 4.

273 LAGARDE, IMF Ethics and Finance 2015.

274 HELD/NOONE, Seattle U. Law Rev. 2020, 698, ZHU/FERRARINI, Governance of Financial Institutions, Chap. 16 n 16.04, 16.07-16.12.

275 THAKOR, IJCB 2021, 47; KENADJIAN, Culture and Ethics in Banking, 23; DICKSON, ECB Behaviour and Culture 2015, 2; CHALY ET AL, FRBNY White Paper 2017, 12.

276 LLEWELLYN, Oxford Handbook Central Banking, 524.

277 CHALY ET AL, FRBNY White Paper 2017, 12.

278 LAGARDE, IMF Ethics and Finance 2015.

with corporate governance and institutional culture. In addition, individual responsibility emerged as a topic, which is seen as having the potential to influence firm culture.[279]

86 The developments outlined here indicate significant departures from traditional principles in financial market regulation. A field which is traditionally targeting institutions, turns to seek to approach individuals directly.[280] Moreover, previously, financial market regulators were traditionally focused on developing detailed and quantitative measures of the positions and resources of financial institutions' bank balance sheets and credit risk, which are mostly tangible and mathematical exercises. Seeking to incorporate culture and conduct is completely different: it is amorphous and not at all quantifiable.[281] In the following sections it will thereby be outlined how international bodies and national institutions pursued these novel topics as a means of financial market supervision and regulation.

2. Developments of International Bodies

2.1. Financial Stability Board

87 In 2015, the Financial Stability Board (FSB) recognised that misconduct in financial institutions had escalated to a level where it potentially posed systemic risk.[282] Consequently, an action plan was set forth to address governance weaknesses.[283] Emphasis was placed on the importance of a strong governance framework, particularly in allocating authority and responsibilities within a company, especially its governing bodies, to ensure legal and ethical business conduct.[284] How to successfully use governance frameworks to address misconduct was a core theme from the beginning and gained increasing momentum over the course of the project.[285]

279 Conley et al, Cornell Int. Law J. 2019, 778; who furthermore name financial incentives as another measure.

280 Pagliari/Kovras, City University of London Working Paper 2021, 14.

281 Gordon/Zaring, JCL 2017, 119.

282 FSB, Chair's Letter 4.2.2015, p 5; see also fn 155 of this thesis for a brief definition of the FSB.

283 For the announcement of the action plan see FSB, Chair's Letter 9.4.2015, 5.

284 FSB, Progress Report 2015, 4 et seq.

285 While initially addressed in the form of risk governance (see e.g. FSB, Chair's Letter 4.2.2015, 5), this shifted to governance in the progress reports over the years. In all of them, potential issues in or with the frameworks to mitigate misconduct are addressed.

In its subsequent report of 2017, "Stocktake of Efforts to Strengthen Governance Frameworks to Mitigate Misconduct Risk", the FSB evaluated approaches by international bodies, national authorities, and firms in using governance frameworks to mitigate misconduct. The findings were collected and presented in the report, supplemented by literature and scientific reviews.[286] It identified poor oversight by senior management, lack of compliance and risk awareness, deficiencies in organisational culture, and failures in internal control systems as root causes for the ongoing misconduct.[287] Finally, in 2018 the FSB published "Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors". Along the three evaluated key areas: mitigating cultural drivers of misconduct; strengthening individual responsibility and accountability; and addressing the rolling bad apples phenomenon, 19 possible instruments were presented for institutions and supervisors.[288] The instruments were based on a common theme, namely that culture needs to be prioritised among the firm's leaders who can bring the full resources of an institution to bear on the problem.[289] The set of measures can be seen as a collection of best practices from different jurisdictions, which was selectively enriched with additional scientific resources or inputs on possible ways of implementation.[290] 88

Along the theme of mitigation of cultural drivers of misconduct, the report observed the relationship between governance frameworks, culture and conduct, which are found to mutually influence each other both positively and negatively. For example, governance frameworks influence the way the business operates, including its systems, controls and processes. A poorly designed or implemented framework can negatively impact culture and contribute to misconduct risk. It identified leadership, decision-making processes and values and behavioural norms of the firm among influential elements of culture.[291] 89

286 FSB, Stocktake 2017, 1 et seq., 7 et seq.

287 FSB, Stocktake 2017, 22.

288 FSB, Toolkit 2018, 4-5.

289 Held/Noone, Seattle U. Law Rev. 2020, 711.

290 Cf. FSB, Toolkit 2018, 1-4.

291 FSB, Toolkit 2018, 8 et seq. It was consequently suggested that senior leadership role articulates a clear cultural vision (tool 1) and promotes the identification of conflicting drivers (tool 2). Once identified, firms can act to shift behavioural norms in line with their cultural vision, including reinforcing governance frameworks (tool 3). On the supervisory side, it is suggested that authorities build programmes focused on culture (tool 4), prioritise reviews based on a risk-based approach (tool 5), and use a broad range of information techniques to assess cultural drivers of misconduct and engage with firms' leadership to convey observations on behaviour and culture (tools 6 and 7), see FSB, Toolkit 2018, 13-21.

90 Furthermore, the FSB evaluated a need for reinforcing individual accountability. As a reason to establish such the body named the growing amount of fines on institutions which it acknowledged critically, alongside the prevalent notion that they were sometimes seen as a simple cost of doing business. Establishing individual accountability was also seen to be potentially supportive of cultural change at firms and to support individuals to understand and appreciate the responsibilities assigned to them.[292]

91 Lastly, the FSB found that addressing the rolling bad apples phenomenon was important. This term is used to describe the problem of individuals who engaged in misconduct but are still able to obtain subsequent employment elsewhere without disclosing their earlier infringements. Consequently, employees are seen as mobile, but their conduct records aren't and thereby a valuable deterrent, namely the risk of future employment, becomes ineffective. The FSB toolkit suggested to address this issue with tools focused on improving hiring practices and ongoing monitoring of individuals.[293]

92 Furthermore, in the FSB's "Thematic Review on Effective Corporate Governance" (2017), the governance frameworks for banks were evaluated, providing recommendations for financial institutions and regulators.[294] This review, though a regular evaluation and not specific to the present issue, showed links to the discussed topic of ongoing misconduct in banks. *Inter alia*, the responsibilities of the board were discussed, with a suggestion to consider adopting codes of conduct for banks; encourage boards to undertake regular assess-

292 FSB, Toolkit 2018, 22; see also 23-25 on this topic. The FSB proposed that the firms and/or authorities identify and assign key responsibilities within a firm (tool 8), promoting individual accountability and transparency. It suggests for individuals to be held accountable through legislative/regulatory provisions, internal processes, supervisory action, and regulatory enforcement (tool 9), highlights that assessing the suitability of individuals with key responsibilities ensures integrity and professional competency (tool 10), and suggests that national authorities develop and monitor a responsibility and accountability framework, including the identification, allocation, and enforcement of responsibilities (tool 11), see FSB, Toolkit 2018, 26-31.

293 FSB, Toolkit 2018, 32, see also 33-40 on this topic. For hiring, firms are advised to communicate conduct expectations consistently (tool 13), enhance interviewing techniques to assess behavioural competency (tool 14), and leverage diverse sources of information about candidates (tool 15). To ensure ongoing suitability, firms should reassess employee conduct regularly (tool 16) and conduct exit reviews for former employees (tool 17). National authorities can contribute by supervising firms' employment practices (tool 18) and promoting compliance with legal requirements for employee conduct information (tool 19), fostering a more comprehensive and consistent approach to oversight, see FSB, Toolkit 2018, 41-44.

294 FSB, Thematic Review 2017, 1.

ments of their effectiveness; and consider enhancing transparency of the board nomination process and the qualifications of board members.[295] Moreover, it suggested that enforcement powers by supervisory authorities should be appropriately augmented to address weaknesses in corporate governance frameworks or non-compliance with subsequent requirements.[296]

2.2. Basel Committee on Banking Supervision

93 In the 2015 revision of the BCBS guidelines, corporate governance principles for banks marked a significant shift in focus towards corporate culture and the role of the governing bodies in risk governance. This revision, as previously elaborated, was influenced by the FSB's thematic review on risk governance (from 2013) and contemporary corporate governance developments.[297] Whilst the reform did not specifically refer to the issues discussed herein, the observed developments still went in the direction of addressing these. One of the most notable changes in the revised principles was the increased emphasis on "culture", with the term's usage rising from just three mentions in the previous version (from 2010) to 38 in the present version from 2015.[298]

94 The current principles now recognise the importance of fostering a corporate culture that reinforces norms for responsible and ethical behaviour, considering it a fundamental component of good governance. The board of directors is specifically tasked with promoting this sound corporate culture.[299] Its role includes setting a strong ethical tone at the top and supervising management's efforts in developing and maintaining a robust corporate and risk culture. Additionally, management is required to establish a documented code of ethics or conduct, aiming to create a culture based on honesty and accountability that protects the interests of customers and shareholders. This revision also brought senior management under closer scrutiny by supervisors, aligning with the broader regulatory focus on enhancing risk management and cultural governance within financial institutions.[300]

95 Furthermore, according to the international body, bank supervision in the last decade was about providing rules to foster more resilient bank balance sheets,

295 FSB, Thematic Review 2017, 8 et seq., see 26-46 for details.
296 FSB, Thematic Review 2017, 8, see 13, 15-19 for details.
297 Cranston et al, 98 ; see also n 53 of this thesis.
298 Cf. BCBS, Guidelines 2010; BCBS, Guidelines 2015.
299 BCBS, Guidelines 2015, n 29 et seq.
300 Cranston et al, 99 et seq. See also n 69-73 herein for the requirements the BCBS guidelines set forth on senior management.

while the next decade will focus on establishing measures to nurture more resilient bank cultures.[301] It was indicated that topics such as risk culture and conduct, as well as strengthening individual responsibility and accountability, are to remain relevant on the international regulatory agenda.[302] In the spring of 2023, the global banking industry faced significant turmoil. During a brief period, several banks, possessing total assets of over one trillion USD, were either shut down, put into receivership, or rescued. The BCBS observed that this turmoil revealed critical weaknesses in the governance and risk management practices of these institutions. Specifically, it was found that some banks showed ineffective management and board oversight and failed to adequately respond to supervisory instructions. It also stated that while many of the issues highlighted appear obvious and quite basic in nature, some governing bodies of banks still failed in their most elementary responsibilities. Thereby the need for subsequent improvements was voiced.[303] In its ensuing report on the turmoil in the banking sector in 2023, the BCBS stated that the primary source of financial and operational resilience stems from banks' own risk practices and governance arrangements. Among other findings, the turmoil exposed issues related to risk culture, as well as ineffective senior management and board oversight. There was also a failure to adequately respond to supervisory feedback and recommendations. Consequently, the importance of supervisors assessing a bank's governance and risk management practices was highlighted as a foundational step toward ensuring its safety and soundness. The composition of the board and the degree to which its members possess relevant experience, including in banking and finance, and the board's ability to effectively challenge the bank's management were identified as areas needing enhanced scrutiny by supervisory authorities.[304]

2.3. Group of Thirty

96 In 2011 the Group of Thirty (G30) started a project on the effective governance of major financial institutions. The aim of the initiative was to share actionable wisdom on the essence of effective governance and what it takes to build and nurture governance systems that work. In its work it shared insights to poli-

301 Rogers, BCBS Changing Role.

302 BIS, Press Release 7.11.2018.

303 Hernàndez de Cos, BCBS Banking Turmoil 2023. Although the source does not specifically identify the banks mentioned, the context and explicit dates provided suggest that it likely encompasses the Swiss bank Credit Suisse, as well as the American banks Silicon Valley Bank, Signature Bank, and First Republic Bank.

304 BIS, Report 2023, 1, 18-19.

cymakers and systemically relevant institutions.[305] In its initial report on the topic titled "Toward Effective Governance of Financial Institutions" published in 2012, the G30 identified undesirable behaviour as one of the main causes for the corporate governance failures of systemically important institutions during the global financial crisis.[306] It drew the necessity of supplementing hardware aspects, such as organisational structures and processes in governance, with software aspects, such as people, skills and values, in order to make corporate governance functional.[307]

97 In 2015, a time which the G30 identified as a "low point" in banking with regards to customer trust, reputation and economic returns, the report "Banking Conduct and Culture, A Call for Sustained and Comprehensive Reform" was published. It highlighted the need for a sustained focus on conduct and culture, identifying poor cultural foundations as key contributors to the persisting conduct issues. Recommendations were provided for improving areas like senior management accountability and governance.[308] The report subsequently presented suggestions for institutions on how to improve in the identified areas in order for banks to achieve the desired results with their cultural evolution.[309] Additionally, it laid out the role of regulators, supervisors and enforcement authorities in supporting banks to improve on the identified issues.[310]

98 The latest report, which built on the previous one, was published in 2018 and is called "Banking Conduct and Culture, A Permanent Mindset Change". It assessed the progress of the banking industry with regards to culture and conduct since the global financial crisis generally and more particularly since the previous report.[311] The report found that despite improvements, the banking industry still faced reputational issues linked to ongoing misconduct scandals.[312] Regarding senior accountability and governance, it emphasised the need for a dedicated committee overseeing the bank's conduct and culture to ensure effective and sustained integration of the desired cultural values. Fur-

305 G30, Report Effective Governance 2012, 5 et seq.

306 G30, Report Effective Governance 2012, 5. See e.g. also Hodges, 648-651; Llewellyn, Oxford Handbook Central Banking, 518-520 for a discussion of the respective developments of the G30.

307 G30, Report Effective Governance 2012, 29.

308 G30, Report Conduct and Culture 2015, 11.

309 G30, Report Conduct and Culture 2015, 26.

310 G30, Report Conduct and Culture 2015, 54-56.

311 G30, Report Conduct and Culture 2018, 1-2.

312 G30, Report Conduct and Culture 2018, 4-5.

thermore, bank boards and executive management should collaborate closely with various units to implement robust processes to identify and report deviations from desired behaviours, and demand comprehensive information for regular management discussions, emphasising the importance of auditability and alignment with reporting for managing conduct progress and identifying emerging risks.[313]

3. Emerging National Approaches

3.1. Conceptual Definition

99 In wake of the persisting governance failures in banks, not only international bodies, but also national regulators and supervisors have proactively engaged in devising strategies to address the challenges.[314] The national responses were identified to have manifested as two primary streams, each exemplifying a distinct approach.

100 The first stream adheres to the conventional framework of financial market regulation and supervision. Characterised by its prescriptive nature, it traditionally mandates specific behaviours while proscribing others, backed by sanctions.[315] The British "Senior Managers and Certification Regime" (SM&CR) exemplifies this approach. It emphasises a regulatory focus on individual accountability throughout the entire supervisory law life cycle by traditional means of financial market regulation and supervision. The second stream adopts a proactive stance, concentrating on financial institutions' culture and behaviour to pre-emptively address potential issues in banks.[316] It leverages education and persuasion to curb excessive risk-taking behaviours.[317] A notable exponent of this approach is the Dutch National Bank (DNB, *De Nederlandsche Bank*), which pioneers a novel method in financial market supervision by overseeing the *behaviour and culture* of firms. The focus of this approach predominantly lies in senior management being regarded as having pivotal influence in the firm's culture.[318] It is important to recognise that these streams are not mutually exclusive; elements of each are integrated within the other. For instance, the British approach underscores the paramount importance of

313 G30, Report Conduct and Culture 2018, 39 et seq.
314 Walker, Seattle U. Law Rev. 2020, 723.
315 Conley et al, Cornell Int. Law J. 2019, 774.
316 Walker, Seattle U. Law Rev. 2020, 725.
317 Cf. Conley et al, Cornell Int. Law J. 2019, 774.
318 Walker, Seattle U. Law Rev. 2020, 725.

culture in financial market supervision, however the SM&CR influences cultural aspects through process-oriented means like responsibility allocation.[319] Similarly, the Dutch approach, despite its focus on cultural and behavioural aspects, has access to the full regulatory toolbox of traditional financial market regulation and especially retains the possibility of imposing sanctions as a complementary measure.[320]

There is no common terminology to be identified for these two distinct streams. Sometimes they are discussed under the label "hard" for the British approach and "soft" for the Dutch approach.[321] Such terms may inadvertently confine the understanding of the respective setup, given that they are relatively fluid in their nature. Therefore, for the present work, the term "emerging approaches" is adopted to provide a more encompassing and flexible definition for the phenomenon of further developed financial market supervision and regulation, which is found to have its roots in the observed ongoing corporate governance failures. This terminology underscores the innovative aspects of these approaches. It also leaves enough room to illustrate the novel and broadening spectrum of regulatory possibilities beyond conventional measures like standard corporate governance frameworks and fit and proper tests. Following this, both of the identified emerging approaches will be modelled against the background of their general national setups. In the later course of this work, the distinctive methodologies of the *emerging* methodologies will be presented along the supervisory law life cycle of authorisation, ongoing supervision and enforcement. The aim is to illustrate the subsequent spectrum of possibilities of financial market supervisors to address the observed issues. 101

3.2. United Kingdom

3.2.1. *General Setup*

The United Kingdom has adopted a so-called twin peaks regulatory architecture. While the Prudential Regulation Authority (PRA) is responsible for the solvency and financial soundness of institutions, and hence the prudential objectives, the Financial Conduct Authority's (FCA) mandate is the conduct of business and market regulation. Banks are so-called dual-regulated firms and 102

319 Bailey, PRA Culture 2016, 1; Hickman, Mod. Law Rev. 2022, 17.

320 Conley et al, Cornell Int. Law J. 2019, 774.

321 See e.g. Zaring, Seattle U. Law Rev. 2020, 559; Conley et al, Cornell Int. Law J. 2019, 774; Omarova, Cornell J. Law Public Policy 2018, 799-800; Thakor, IJCB 2021, 47, 63.

are jointly regulated and supervised by the PRA and FCA. The British Financial Services and Markets Act 2000 (FSMA 2000) constitutes the foundation for the herein relevant prudential supervision and thereby the legal starting point, which is richly supplemented by further accompanying guidance such has rulebooks or handbooks.[322]

103 Traditionally, the UK has been at the forefront of corporate governance initiatives and published numerous so-called reports (e.g. Cadbury Report) or reviews (e.g. Walker Review) for corporate governance in general but also for the financial sector and banks specifically.[323] Today, the UK has a corporate governance framework applicable to companies operating across the economy, including PRA and FCA-regulated firms.[324] The Companies Act 2006 provides the key statutory provisions, and for listed companies, the Financial Reporting Council's UK Corporate Governance Code sets standards of good practice, which also includes principles and provisions regarding the senior management of firms.[325] Furthermore, the Walker Review, which was published in the aftermath of the global financial crisis, proposed a corporate governance framework exclusively applicable to banks (and other major financial institutions), and anticipated the BCBS guidelines regarding corporate governance in a comprehensive review. Many of the recommendations were incorporated into the regulatory rules of the PRA and FCA.[326] The UK's corporate governance setup follows a principle-based approach and is based on the comply or explain principle.[327] The PRA also published the supervisory statement called "Corporate Governance: Board Responsibilities", with the aim to delineate specific governance aspects that the authority considers crucial for boards of firms under its regulation. It highlights areas of particular significance for the PRA's supervision, however it does not seek to offer an exhaustive guide outlining the criteria for good or effective governance for boards.[328]

322 Cranston et al, 143; Chiu/Wilson, 248, 252.

323 Green/Johnston/Williams, COB 2017, 2, see 2-6 for an overview of the UK corporate governance codes and reviews. See also n 24 of this thesis, where the Cadbury Report is also discussed.

324 Moore/Petrin, 53.

325 Allen, BoE Bulletin Q3 2018, 7.

326 Kokkinis/Miglionico, 231.

327 Hodges, 632; Moore/Petrin, 59. The comply or explain principle generally refers to the approach where a company can theoretically can opt out from fulfilling requirements of the respective code. However, a valid reason and justification must be provided for non-compliance; the same applies if it involuntarily does not comply with the provisions; see the latter cited source for details.

328 Cranston et al, 104; PRA, SS5/16, n 1.1, where it is also referred to the Financial Reporting Council's UK Corporate Governance Code.

Furthermore, the "Senior Managers and Certification Regime" (SM&CR), which will be discussed in the following section, was implemented in 2016 for banks. It was built upon the previous "Approved Persons Regime" and embedded into the existing statutory framework, which required senior employees in supervised entities to be fit and proper.[329] The requirements which are set forth by the SM&CR are seen as complementary to the existing governance arrangements, especially with regards to responsibility and accountability of senior management.[330] 104

3.2.2. *Senior Managers and Certification Regime*

3.2.2.1. Background and Rationale

In the UK it was recognised that the global financial crisis as well as the persisting ensuing conduct failures exposed serious flaws in the system of board oversight of executive management. Banks whose board-level governance arrangements were considered on paper as best practice were in serious problems.[331] It was found that the varied outcomes among banks under identical regulatory conditions could only be due to differences in management and board execution within these regulatory frameworks. This highlighted the central role the governing bodies of these banks played and their corporate governance.[332] Poor governance and inadequate control facilitated misconduct over an extended period.[333] 105

A closer look into this issue found that the combination of collective decision-making, complex decision-making structures and extensive delegation created a situation in which the most senior individuals at the highest level within banks could not be held accountable for even the most widespread and flagrant of failures.[334] Instead, and in line with the traditional understanding of corporate governance, boards were considered collectively responsible for their actions, mostly leaving the corporation, and not the individuals, accountable for missteps.[335] Senior executives put on blindfolds and hid behind what were considered "accountability firewalls". They were well aware that they 106

329 PCBS UK, Changing Banking for Good 2013, n 8; Kokkinis/Miglionico, 239; see the latter on 241 et seq. for an overview on the previous regime.

330 Allen, BoE Bulletin Q3 2018, 7.

331 PCBS UK, Changing Banking for Good 2013, n 119 et seq.

332 Walker, UK Report 2009, 6.

333 PCBS UK, Changing Banking for Good 2013, n 11; see also Cranston et al, 103.

334 PCBS UK, Changing Banking for Good 2013, n 237.

335 Hickman, Mod. Law Rev. 2022, 6.

wouldn't be punished for what they couldn't see, and they took on the self-protection strategy of a "murder on the orient express" defence, stating that it wasn't them but rather could have been anyone.[336] Then CEO of the PRA acknowledged that there had not been a case of a major prudential or conduct failing in a financial institution which did not have among its root causes a failure of culture that manifested in issues concerning governance, the tone from the top or remuneration.[337]

107 With only a few senior executives facing personal accountability, concerns and questions arose about justifying an environment where rewards seemed individualised, yet responsibility and costs were publicly distributed and mutualised.[338] Consequently, the corporate governance regime existent at that time was under severe criticism and was considered a primary cause for the general public's loss of confidence in the financial sector.[339] Specifically, board effectiveness and the responsibility for corporate governance of senior individuals in institutions were at the centre of attention.[340] Therefore, a necessity was identified to explore options for incentivising ethical behaviour among top bank executives, ensuring they fulfil their duties and effectively supervise their subordinates. Additionally, in cases of failure, there should be a clearer and fairer identification of the responsible individuals.[341]

108 Against this background in 2013 the Parliamentary Commission on Banking Standards proposed measures to restore trust in the banking sector, uphold the UK banking sector's crucial role in supporting the real economy, and maintain international pre-eminence. Amongst other subjects, the proposals included making individual responsibility in the banking sector a reality and reforming bank governance.[342] The Commission recognised that while its proposals alone could not fully address the complex issues in banking, they could contribute by providing regulators with more effective tools to hold individuals accountable and ensuring banks adhere to higher standards.[343] Con-

336 PCBS UK, Changing Banking for Good 2013, n 237; Wheatley, FCA speech 16 March 2015.
337 Bailey, PRA Culture 2016, 1.
338 Allen, BoE Bulletin Q3 2018, 2; Wheatley, FCA speech 16 March 2015.
339 FCA/PRA, CP14/13/CP14/14, n 1.1.
340 Green/Johnston/Williams, COB 2017, 8.
341 PCBS UK, Changing Banking for Good 2013, n 234, 237.
342 PCBS UK, Changing Banking for Good 2013, n 8; the other proposals concerned the themes of creating better functioning and more diverse banking markets; reinforce the regulators responsibilities in the exercise of judgment in deploying their powers; and specifying the responsibilities of the government and parliaments.
343 PCBS UK, Changing Banking for Good 2013, n 113.

sequently, the Senior Managers and Certification Regime (hereinafter also: the SM&CR or regime) was created and introduced for banking institutions in 2016.[344]

Today, the SM&CR is seen as a key tool by the FCA and PRA to regulate corporate governance in financial institutions by means of a direct regulation of the individuals performing relevant functions.[345] Collective decision-making is seen as being complemented (rather than a substituted) by individual accountability and the allocation of responsibilities assists the board in fulfilling its duties.[346] In addition, it necessarily places greater pressure on the individuals in management positions to self-regulate and monitor behaviours which are within their responsibility.[347] Coupled with the enhanced enforcement powers the regime provides, this framework is viewed as giving senior management a robust set of incentives and deterrents and improves corporate governance.[348] 109

The SM&CR encompasses close cooperation between the PRA, given the regime promotes safety and soundness and financial stability objectives, as well as the FCA as it also promotes objectives in respect of consumer protection and the integrity of the UK financial system.[349] The principles of the SM&CR are embedded within the further prudential rules in the Financial Services and Markets Act 2000. Their specific application is detailed in rulebooks or handbooks of the regulatory authorities and some topic areas are further complemented by supervisory statements and guidance documents. For banks, the PRA's CRR Rulebook is of particular interest, as well as the PRA's Supervisory Statement SS28/15, Strengthening individual accountability in banking.[350] 110

3.2.2.2. Key Features

The general setup for the SM&CR is often illustrated along a pyramid, as it consists of three layers of groups of individuals targeted by the regime, with each layer differing in its regulatory intensity. The *senior managers* constitute the top layer of the pyramid, followed by a group of *certified persons*, and lastly 111

344 Allen, BoE Bulletin Q3 2018, 2; the regime was later extended to insurances and further financial firms, see cited source for details.
345 PCBS UK, Changing Banking for Good 2013, n 11; Green/Johnston/Williams, COB 2017, 17.
346 Allen, BoE Bulletin Q3 2018, 7.
347 Hickman, Mod. Law Rev. 2022, 6.
348 FCA/PRA, CP14/13/CP14/14, n 1.16.
349 Allen, BoE Bulletin Q3 2018, 2.
350 Emmenegger, AJP 2022, 821.

the further *financial services employees* as the base layer. Accordingly, regulation and supervision are most intense for the group of people which constitute the apex of the pyramid and least intrusive at the bottom.[351]

112 A key feature of the SM&CR is that the *senior managers*, at the top of the pyramid, are subject to an entry barrier if they seek to assume such a position. The authorities designate which positions are so-called "Senior Management Functions" (SMFs) and thereby crucial to a firm's safety and soundness.[352] Executive functions (e.g. CEO or CFO) are generally considered as SMFs, as well as selected non-executive functions (so-called oversight SMFs, e.g. chair of the board and chairs of committees).[353] Other non-executive directors are only considered to be in a senior management function if they assume responsibilities of such. These SMFs must fulfil certain requirements, such as being fit and proper. The bank primarily assesses their fulfilments and this assessment is then approved by the PRA and/or the FCA.[354] Banks must annually re-evaluate the fitness and propriety of their operations and inform the regulator of any issues that could justify withdrawal of their approval.[355] An important element of the approval process constitute the regulatory references, which are obtained from previous employers and aim to prevent the undermining of individual accountability, ensuring that individuals with undisclosed previous misconduct are not recycled between firms.[356]

113 Another key aspect of the regime is that it seeks to strengthen the link between seniority and accountability through a clear allocation of responsibilities to a bank's most senior decision makers.[357] Thereby, in the course of the approval process, certain documents must be provided to the authorities. For

351 Shalchi, UK House of Commons Library Briefing 2021, 12.

352 Allen, BoE Bulletin Q3 2018, 3.

353 Kokkinis/Miglionico, 242; see also PRA, SS28/15, n 2.4.

354 Allen, BoE Bulletin Q3 2018, 2 et seq.; Kokkinis/Miglionico, 239 et seq.; FSMA 2000, ss 59(1), 60A(2)(a)-(d). See also n 230-236 of this thesis for further details.

355 Kokkinis/Miglionico, 242; FSMA 2000 s 63(2A). See also n 302 of this thesis for further details.

356 PRA, SS28/15, n 6.2; Allen, BoE Bulletin Q3 2018, 2, 6; FSMA 2000 s 64C; PRA, Rulebook CRR Firms, Fitness and Propriety, n 5. See also n 232 of this thesis for further details.

357 Allen, BoE Bulletin Q3 2018, 2 et seq. It is worth noting that the UK considers its approach to individual accountability as in line with the BCBS guidelines for corporate governance, according to which a bank's supervisory board should establish and be satisfied with the institution's organisational structure, and that it should clearly lay out key responsibilities for the supervisory board and executive management, see cited source, 9 (as well as BCBS, Guidelines 2015, n 24). Furthermore, see Hickman, Mod. Law Rev. 2022, 5, who finds the SM&CR in general to be broader in scope and more onerous than both, the UKs corporate governance provisions and the BCBS guidelines.

example, a "Statement of Responsibilities" is submitted for each senior manager, outlining the persons responsibilities and duties, as well as a "Management Responsibility Map", detailing these responsibilities along the firms' governance structure.[358] While there is a preventive effect attributed to these documents, such are especially of use in the case of misconduct. Regulators may accordingly identify the responsible person, and, if certain conditions are met, impose subsequent enforcement measures.[359] Moreover, senior managers must adhere to a specific set of conduct rules and non-compliance with these is subject to potential sanctions.[360]

However, it is not only senior management functions that are covered by the regime. The next layer of the pyramid covers the group of *certified persons*, where so-called significant-harm positions are addressed. While not SMFs, these are nonetheless positions which involve performing duties which may cause significant harm to the bank or its customers.[361] For these functions the onus is solely on the bank to assess whether the person is fit and proper for the position and to issue a certificate.[362] Still, such individuals are also subject to regulatory references (as the senior managers) and are assessed annually by their employer.[363] Generally, non-executive directors fall in this category, unless they perform a senior management function.[364] Lastly, the bottom layer of the pyramid includes *all financial services staff*, who are subject to a minimum of common conduct rules, which apply to all individuals covered under the regime.[365] 114

358 Allen, BoE Bulletin Q3 2018, 4, 6; FSMA 2000 ss 60(2A-2C). See also n 233 et seq. of this thesis for further details.

359 Shalchi, UK House of Commons Library Briefing 2021, 12; Emmenegger, AJP 2022, 824 et seq.; see also PRA, SS28/15, n 2.46E. See n 414 of this thesis for further details.

360 Allen, BoE Bulletin Q3 2018, 2; Kokkinis/Miglionico, 243; FSMA 2000 ss 66-67. See also n 237-239 of this thesis where this is discussed in more detail.

361 FCA/PRA, CP14/13/CP14/14, n 1.20; FSMA 2000 s 63E(5).

362 Kokkinis/Miglionico, 242; Allen, BoE Bulletin Q3 2018, 6; Green/Johnston/Williams, COB 2017, 17; FSMA 2000 ss 63E, 63F.

363 Allen, BoE Bulletin Q3 2018, 2, 6; such functions are also subject to regulatory requirements on their remuneration; FSMA 2000 ss 63E, 63F.

364 Allen, BoE Bulletin Q3 2018, 3.

365 Shalchi, UK House of Commons Library Briefing 2021, 14.

3.2.3. *Reception of the British Approach*

3.2.3.1. Internationally

115 With its introduction of the SM&CR in 2016, the UK was considered a leader in the field of individual accountability in the banking sector. There has been a growing international interest in individual accountability regimes, which suggests that others see potential in adopting or at least exploring this approach.[366] The British setup is often referred to in discussions on how to address the persisting post-crisis issues around misconduct and international literature utilises it as an example on how to tackle such.[367] The FSB toolkit addressing misconduct also prominently features the regime, where strengthening individual responsibility and accountability is one of the main topics and aspects of the regime are presented as best practices.[368] The UK's approach was furthermore positively acknowledged by the International Monetary Fund (IMF), as in 2016 it identified gaps in this jurisdiction with regards to its approach to supervising corporate governance, especially in the supervisors' abilities to hold key individuals accountable for their actions or inactions. It consequently supported the overhaul of the existing framework and subsequent implementation of the new regime.[369] Following up in 2022, the IMF noted that while the SM&CR was producing positive results, the PRA had yet to use the full range of powers provided by the framework.[370]

116 A number of jurisdictions are considering the regime or have already implemented reforms which incorporate features of the SM&CR, among them Hong

366 PRA, Report Evaluation SM&CR 2020, 4; ALLEN, BoE Bulletin Q3 2018, 9.

367 See e.g. CHALY ET AL, FRBNY White Paper 2017, 14; HELD/NOONE, Seattle U. Law Rev. 2020, 704-706; ZARING, Seattle U. Law Rev. 2020, 560-561, 574-577; CULLEN, Financial Markets, 176; SHAFIK, BoE Ethical Lift 2016, 4; MCCORMICK/STEARS, n 15.03.

368 FSB, Toolkit 2018, 22-25, see e.g. 26 et seq., 53-57, 61, 64 where the UK approach is discussed. See n 88-91 of this thesis for an outline of the toolkit.

369 IMF, UK Country Report 2016 no. 16/166, n 7, 20. The International Monetary Fund (IMF) was established in the aftermath of the great depression of the 1930s. Its role has expanded to include monitoring and ensuring compliance with international financial standards, though not originally mandated in this regard. Such monitoring e.g. takes places under so-called Financial Sector Assessment Program (FSAP), which are evaluations designed to determine the support and development requirements of member states, analyse financial stability risks, and help shape policy alongside domestic regulators. These evaluations also review member states' compliance with international norms in sectors including banking supervision, securities, accounting, and anti-money laundering practices, see ARMOUR ET AL 887 et seq.

370 IMF, UK Country Report 2022 no. 22/57, n 52.

Kong, Australia, Malaysia, Singapore and Ireland. It is also observed that while the operation of these regimes differs in each jurisdiction, they all emphasise the strengthening of governance and conduct, as well as the accountability of senior individuals.[371] Recognising the British SM&CR in 2015, FINMA considered the Swiss principle-based regulation more favourably.[372] Later however, Switzerland showed interest in aspects of the SM&CR. The regime was specifically mentioned in a postulate that called to enhance senior management accountability in the financial sector.[373] Furthermore, in February 2023 FINMA, for the first time (as far as publicly known), required a bank to record the responsibility of the bank's highest managers (around 600 individuals) in a document of responsibility in the aftermath of Credit Suisse's "Greensill" case.[374] After the emergency takeover of Credit Suisse by UBS in March 2023, the supervisory authority also publicly stated that it had been working on an proposal for a Senior Manager Regime to the legislator, specifically to address the question of attribution of individual responsibility in enforcement proceedings.[375] It thereby notably departed from its previous view. Similarly, the senior managers regime was proposed as a potential future means to enhance FINMA's supervisory capabilities from the expert group on banking stability following the emergency takeover.[376] Also, whilst limited, there is a discourse of the regime identifiable in academia.[377]

3.2.3.2. Nationally

On a national level, the UK authorities repeatedly seek to evaluate the implemented regime in exchange with the industry. For example, in an evaluation from December 2020, approximately four years after its introduction to banks, 117

371 PRA, DP1/23 Appendix, 2 et seq., see cited source for further details and analysis on the international developments of individual accountability regimes.

372 Branson, FINMA Corporate Governance 2015, 6 et seq.

373 Postulate 21.3893 from Andrey Gerhard in the National Council from 18.6.2021; see also n 317 of this thesis.

374 FINMA, Press Release CS Greensill 28.2.2023, 1-4, especially 3; see also n 385 of this thesis for further details.

375 Amstad, FINMA Address 2023, 5; FINMA, Report CS Crisis 2023, 48.

376 Expertengruppe Bankenstabilität, Report 2023, 58, 65, 81, 85. Following UBS's acquisition of Credit Suisse in March 2023, the Federal Department of Finance established the "expert group bank stability" (*Expertengruppe Bankenstabilität*), tasked with providing independent insights on the banking sector's role and regulatory framework in the context of Switzerland's financial market stability. The report only makes initial suggestions and provides a basis for the further examination of the events and potential future regulatory reforms, see Expertengruppe Bankenstabilität, Report 2023, 2, 81.

377 See e.g. Reiser, SZW 2022, 550-555, Emmenegger, AJP 2022, 817-830.

the PRA found that the SM&CR was achieving its goals, supporting higher professional standards and positively influencing senior managers' behaviour. Concerns were raised that the guidance might prompt firms to appoint senior managers with similar profiles to previous candidates in order to facilitate approval. It was also found that stakeholders view individual accountability and responsibility as complementary, and the PRA should continue to promote these in ways that are mutually reinforcing.[378] Similarly, the FCA published a stocktake report on the SM&CR in the banking sector, three years post-introduction, which highlighted widespread efforts to implement and embed the regime. It found a generally clear understanding of accountability, positive effects on senior managers' mindsets, and improvements in control environments. Concerns were raised about potential overburdening of the supervisory board with operational involvement.[379] It was furthermore found that the SM&CR helps improve governance in banks through increased clarity of individual responsibilities, better-documented governance arrangements (especially in large and complex banking groups), improved challenge and oversight by boards, and more effective supervisory engagement.[380]

118 However, academia also raised some potential issues with the regime. For example, the effectiveness of the SM&CR is questioned due to a low number of enforcement actions and several prominent cases of misconduct in banking since its introduction.[381] In the five years post-implementation, only 37 investigations were conducted, with two resulting in regulatory action. The regime, which was *inter alia* designed to facilitate enforcement, is consequently questioned with regards to its potential limited impact, which could lead to individuals taking it less seriously.[382] Concerns were also voiced about the reliance on banks for assessing fitness and propriety, questioning their incentives to cooperate with regulators in achieving regulatory objectives.[383]

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378 PRA, Report Evaluation SM&CR 2020, 3, 5. The evaluation was based on a number of internal and external sources, e.g. through structured interviews with practitioners, advisers and supervisors; a survey of a balanced sample of 140 PRA regulated firms and individual senior managers on their experience of the SM&CR; and regulatory data.

379 FCA, Stocktake Report 2019. The review was based on interviews with 45 people at 15 banking sector firms and trade associations, the Banking Standards Board, the FCA and the PRA.

380 Allen, BoE Bulletin Q3 2018, 6.

381 Hickman, Mod. Law Rev. 2022, 18; see also the IMF's similar view in n 115 of this thesis.

382 Hickman, Mod. Law Rev. 2022, 21-22.

383 Kokkinis/Miglionico, 243.

3.3. The Netherlands

3.3.1. *General Setup*

The Netherlands also has a twin peaks supervisory architecture, which is reflected in the division of labour between the Dutch National Bank (DNB, *De Nederlandsche Bank*) as the prudential regulator for all financial institutions subject to prudential supervision, and the Dutch Authority for Financial Markets (AFM, *Stichting Autoriteit Financiële Markten*) as the conduct of the business regulator. According to the European regulatory framework, banks (among others) are subject to both prudential and conduct supervision, and thereby Dutch banks are supervised by both authorities, which results in a close collaboration of the DNB and AFM.[384] The Dutch Financial Supervision Act (FSA, *Wet op het Financieel Toezicht*) builds the legal basis for the herein relevant prudential supervision, complemented by accompanying policy rules or guidelines on specific aspects.[385] 119

While the Netherlands has a general corporate governance code for listed companies, there also exists a specific code for banks (Code Banken) which was established after the global financial crisis. The Dutch government gave the banking industry the competence to setup a system of self-regulation. The rationale behind this approach was that the sector itself must take the lead in regaining society's trust.[386] Consequently, the Dutch Banking Association (*Nederlandse Vereniging van Banken*, NVB) developed the banking code, which came into effect in 2010.[387] The banking code sets forth requirements regarding sound and ethical operations; the supervisory and executive board; risk and renumeration policy and audit.[388] *Inter alia*, it assigns the responsibility for sound governance to the boards, as well as for developing and promoting standards of integrity, morals and leadership in the bank.[389] Furthermore, it sets forth requirements regarding the governing bodies' compositions and assigns high-level responsibilities.[390] Today, it is based on a comply or explain 120

384 Busch/Palm-Steyerberg, Governance of Financial Institutions, Chap. 8 n 8.47.

385 Busch/Palm-Steyerberg, Governance of Financial Institutions, Chap. 8 n 8.49; part 3 of the FSA is in the exclusive competence of DNB, and part 4 of the FSA, concerning the conduct of business supervision, is in the exclusive competence of the AFM.

386 de Bos/Galle/Jans, JBR 2018, 101.

387 de Bos/Galle/Jans, JBR 2018, 103.

388 NVB, Toekomstgericht Bankieren, Code Banken, 4-14.

389 NVB, Toekomstgericht Bankieren, Code Banken, 4-6.

390 NVB, Toekomstgericht Bankieren, Code Banken, 7-10.

principle.[391] Furthermore, the Netherlands set fit and proper requirements for managers and key function holders of banks, with the relevant provisions prescribed in the FSA and supplemented by two further policy rules. The DNB takes the lead on the assessment of managers and key function holders of banks, while the AFM has the right to veto a positive decision.[392]

121 Supplementary to this basic set up, the Dutch financial market supervision system emphasises the *behaviour and culture* of its financial institutions, including their key personnel. Launched in 2009 by DNB, this approach to supervision utilises a novel model to deepen insights into these areas and reduce potential risks.[393] Another element, in which the strong focus on individual conduct is visible, is in the mandatory banker's oath and its accompanying conduct rules. The oath and the conduct rules are included in the consolidated package called Future-oriented Banking, which furthermore encompass the previously mentioned banking code and also a social charter.[394] Given its self-regulatory nature the banking industry continues to play a role by reforming the various standards contained in the package.[395]

3.3.2. *The Supervision of Behaviour and Culture*

3.3.2.1. Background and Rationale

122 The DNB did not perceive the global financial crisis as merely a manifestation of deficient governance structures, but rather it identified it as a reflection of substandard board and management behaviour within these frameworks.[396]

391 DE BOS/GALLE/JANS, JBR 2018, 102. See fn 327 of this thesis for a brief description of the comply or explain principle.

392 BUSCH/PALM-STEYERBERG, Governance of Financial Institutions, Chap. 8 n 8.48-8.51. The rules are laid down by FSA 3:8 and 3:9 and the joint policy rules which consist of the suitability policy rule (*Beleidsregel Geschiktheid*) and the integrity policy rule (*Beleidsregel Betrouwbaarheid*). See also RESTI, EU Analysis 2020, 13-18 for an overview on the EU rules on fit and proper requirements.

393 NUIJTS/DE HAAN, Financial Supervision, 151 et seq.

394 NVB, Toekomstgericht Bankieren, Maatschappelijk Statuut, 3. The social charter (*Maatschappelijk Statuut*) outlines what the industry sees as necessary of the banking sector for it to be stable, reliable and service-oriented. Accordingly, the banking sector is seen as pluriform and offers customers a wide choice, in which banks must be reliable, service-oriented and transparent, and bank employees ethical, expert and professional and ensure that customers and stakeholders are treated with care. Also, banks have a social responsibility to contribute to a sustainable economy, see cited sources 3-7.

395 DE BOS/GALLE/JANS, JBR 2018, 116; NVB, Toekomstgericht Bankieren.

396 RAAIJMAKERS, DNB Supervision of Behaviour and Culture, 14.

Similarly, the revelation of the LIBOR scandal in 2013 was regarded as another episode resulting in a profound erosion of trust in the financial sector and consequential financial losses.[397] This incident served as an illustrative case highlighting how conduct within a financial institution significantly impacts its (financial) performance. Implicated banks attributed it to misconduct of their employees, leading to subsequent terminations. The DNB, deeming this approach too short-sighted, emphasised the need to address the cultural and organisational context which allow such cases to occur. Employee misbehaviour may stem from faulty leadership, flawed strategies, ineffective performance management, or adverse incentives, necessitating a more comprehensive approach.[398] The DNB concluded that behaviour and culture risks in financial institutions are underestimated and constitute a blind spot for many financial market supervisors.[399]

In response to ongoing challenges in the financial sector, DNB has evolved its supervisory approach beyond traditional methods focused on aspects of business operations such as solvency and liquidity.[400] Recognising the limitations of these primarily backward-looking and financial risk-centric strategies, the authority, in pursuit of its core objective of enhancing firm and financial stability, adopted a multifaceted approach in 2009. This new strategy emphasises not only structural insights but also behavioural and cultural factors within financial institutions.[401] To implement it, DNB introduced the "Supervision of Behaviour and Culture", underpinned by a newly developed model. This initiative, outlined in a policy vision document, marked a significant shift in supervisory practices. It aimed to provide deeper insights into behavioural and cultural aspects within financial institutions.[402] 123

This initiative entailed the establishment of expertise through the creation of an expert centre for governance, behaviour, and culture, wherein organisational psychologists were hired to create the new concept.[403] Delving into the realms of behavioural science, drawing from psychology and change literature, the DNB developed an enhanced supervisory method. The objective was to transition to a more qualitative assessment of institutions, with a particular emphasis on senior management, by adopting a forward-looking perspective 124

397 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 27.
398 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 27 et seq.
399 Raaijmakers, DNB Supervision of Behaviour and Culture, 43.
400 Nuijts/de Haan, Financial Supervision, 151.
401 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.03 et seq.
402 Nuijts/de Haan, Financial Supervision, 151 et seq.
403 Nuijts/de Haan, Financial Supervision, 152.

to prevent issues rather than merely react to them.[404] Over the years, this approach has formed the basis of DNB's evolved concept of supervision, reflecting a more holistic understanding of the factors influencing financial sector stability.[405]

125 According to the DNB, this approach is based on three key premises. First, the reliance solely on increasing rules and regulations is insufficient to prevent financial crises, as it saw evidenced by the global financial crisis, which underscored the pivotal role of human behaviour. It can also mislead regulators to having the perception of being in control, while in reality they are not.[406] Second, a strong link exists between perceived behaviour and culture within financial institutions and public trust in the financial sector, a critical factor for financial stability. Financial institutions, particularly senior management, are expected to foster a culture which prioritises clients, practices risk management, and rejects harmful or illegal behaviour.[407] Third, behaviour and culture are integral components of a financial institution's organisational structure and operational success, necessitating active attention, such as the development of comprehensive institution-wide views and mission statements.[408]

126 The primary responsibility for improving bank behaviour is attributed to the upper-level management, whilst the DNB, as a supervisor, employs suitable prudential, legal, and organisational psychological tools and methodologies to address behavioural and cultural risks.[409] By uncovering underlying causes of risks, the approach allows for proactive mitigation, enhancing supervisory effectiveness by addressing issues before they escalate into solvency and liquidity problems. The DNB emphasises that supervisory authorities, being independent and free from conflicts of interest, are best suited to address behaviour and culture.[410] Today, its novel approach to supervision seamlessly integrates with DNB's prudential supervision, coexisting with and complementing the traditional approach rather than replacing it.[411]

404 Raaijmakers, DNB Supervision of Behaviour and Culture, 13; Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 35.
405 Nuijts/de Haan, Financial Supervision, 151 et seq.
406 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 29.
407 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 30.
408 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 31.
409 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 31.
410 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.11; Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 35.
411 Conley et al, Cornell Int. Law J. 2019, 781; Nuijts/de Haan, Financial Supervision, 161.

3.3.2.2. Key Features

The legal starting point which requires banks to integrate behaviour and culture into their business operations is found in the Dutch Financial Supervision Act (FSA). According to FSA 3:17, banks are required to organise operations in such a way to safeguard controlled and sound business operations and thereby also includes the implementation of robust governance arrangements.[412] In line with its interpretation of the subsequent principles from the BCBS guidelines for bank corporate governance as well as the European Banking Authority's Guidelines on internal governance, the DNB acknowledges the interplay of behavioural and cultural risks and their potential impact on governance arrangements and business operations. It thereby built its approach into the existing corporate governance provisions.[413] 127

In contrast to a set of predetermined regulations, the behaviour and culture supervision of the Netherlands adopts a distinctive approach, anchored in a *model* developed by the DNB.[414] The model categorises organisational culture into three layers – behaviour, group dynamics, and mindset – using an iceberg metaphor. Behaviour represents the visible portion of the iceberg, while group dynamics and mindset, being less directly observable, lie beneath the surface.[415] The authority provides definitions for each element, elucidating their relevance within its role as a financial market supervisory authority.[416] 128

In support of this model five foundational assumptions that guide the supervisory approach were established. These include the recognition that financial institutions are ultimately responsible for their behaviour and culture, and that supervisors can identify and mitigate associated risks. The approach necessitates a contextual understanding, aligning with each institution's broader or- 129

412 Van Esch, Comm-FSA 3.17, A.1; Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 32.

413 Scholten/Raaijmakers, DNB Supervision of Behaviour and Culture, 32-33; Nuijts, Governance of Financial Institutions, Chap. 17 n 17.32-17.34. Accordingly it is the national implementation into Dutch law of article 74 I of the European Capital Requirements Directive IV (CRD IV Directive 2013/36/EU), according to said article, robust governance arrangements "[...] *include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management.*".

414 Raaijmakers, DNB Supervision of Behaviour and Culture, 44.

415 Raaijmakers, DNB Supervision of Behaviour and Culture, 47.

416 See Raaijmakers, DNB Supervision of Behaviour and Culture, 48-51.

ganisational strategy and governance. Additionally, it emphasises the need for a customised approach, tailored to individual institutions rather than enforcing a uniform culture, with a particular focus on the senior management of these institutions.[417]

130 At the heart of the supervision of behaviour and culture are the *supervisory risk assessments*, where the authority strives to identify and mitigate risks.[418] The DNB has devised multiple frameworks to capture crucial drivers of firm performance, encompassing areas like board effectiveness and strategic decision-making.[419] Aligned with the behaviour and culture model, the DNB pinpoints risks related to behaviour in decision-making, leadership, and communication, as well as those associated with group dynamics, a standard survey subject.[420] These assessments extend to financial institutions of all sizes, with a particular emphasis on larger and more significant entities, namely banks and insurance companies.[421] In employing its tailored and context-dependent approach it identifies behavioural and cultural risks and assesses their potential impact on institutional performance.[422] Additionally, the authority conducts *thematic reviews* on behaviour and culture, which are focused on one specific theme (such as for example leadership or decision-making).[423] These topics are then subject to further examination in numerous supervised entities for approximately one year.[424] The DNB seeks to establish a collaborative, trust-based relationship with its supervised entities in order to motivate such to engage in board-level self-reflection and to be open to criticism and cultural change.[425]

417 Raaijmakers, DNB Supervision of Behaviour and Culture, 53 et seq.; see 54-60 for a detailed explanation of these assumptions including their empirical evidence.

418 Raaijmakers, DNB Supervision of Behaviour and Culture, 16. See also n 303-307 of this thesis for further details.

419 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.12.

420 Raaijmakers, DNB Supervision of Behaviour and Culture, 52 et seq.; see also n 128 of this thesis.

421 Raaijmakers, DNB Supervision of Behaviour and Culture, 17.

422 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.31; Raaijmakers, DNB Supervision of Behaviour and Culture, 59 et seq.

423 Raaijmakers, DNB Supervision of Behaviour and Culture, 17; previous topics were decision-making (2011), board effectiveness (2011-2012), behaviour and culture (2012-2013), capacity for change (2014), root cause analysis and risk culture (both 2015).

424 Khan, IMF Working Paper 2018, 32.

425 Conley et al, Cornell Int. Law J. 2019, 816.

A key feature of the approach is the strong focus on leadership and therefore senior management. The DNB deems leadership as a paramount determinant of organisational performance, given that these individuals directly shape organisational outcomes through strategic decisions and indirectly through their influence on employees.[426] The DNB generally perceives the management of an institution as better equipped to establish the desired culture, considering it one of their responsibilities.[427] Research conducted by the DNB on the impact of internal and external supervision on employee behaviour revealed that while both have an impact, the influence of internal supervision is greater. In its role as an external supervisor, the DNB considers it crucial to optimise its capacity by effectively influencing internal supervision.[428] 131

It must be highlighted that while the Dutch approach primarily centres on the culture of financial institutions, it refrains from establishing a predefined culture or offering a cultural blueprint. Instead, it concentrates on delineating minimum requirements essential to prevent or alleviate cultural risks that could adversely affect an institution's performance, soundness, and integrity.[429] The approach is committed to influencing firms to mitigate identified behaviour and culture risks, monitoring them until such mitigation is achieved. Consequently, the DNB does not enforce behaviour and culture *per se* unless the behaviour in question leads to a violation of a regulatory provision.[430] 132

To gain a conclusive overview on the Dutch model discussed in this section, two more noteworthy aspects remain to be mentioned. One being the DNB's extensive research and publication activity in this realm. Through its publications, the supervisory authority furnishes tools for examining behaviour and culture, elaborates on its supervisory approach, shares thematic review findings, and reports on evaluations of the supervisory approach.[431] Crucially, it 133

426 Römer, DNB Supervision of Behaviour and Culture, 157.

427 Raaijmakers, DNB Supervision of Behaviour and Culture, 59 et seq.; Nuijts, Governance of Financial Institutions, Chap. 17 n 17.31.

428 de Waal, DNB Supervision of Behaviour and Culture, 307, 316. Internal supervision refers to supervisors operating from inside organisations, such as senior management or audit committees who demand accountability from their employees; while external supervision refers to external supervisors who demand accountability from the organisation, such as the DNB or external audit firms.

429 Raaijmakers, DNB Supervision of Behaviour and Culture, 58 et seq.; Nuijts, Governance of Financial Institutions, Chap. 17 n 17.31.

430 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.44.

431 Nuijts, TvC 2018, 185 et seq.; see Nuijts, Governance of Financial Institutions, Chap. 17 n 17.04 for an overview of the publications in English.

regularly communicates findings from behaviour and culture assessments, best practices, and scientific research to heighten awareness and promote these perspectives within financial firms. This allows DNB to clearly articulate expectations on these matters and provide the sector with pertinent tools and methodologies.[432] Moreover, the DNB's robust emphasis on behavioural supervision extends beyond individual institutions to influence the culture of the entire financial sector. The DNB hosts events under the title rationale for change, including round tables and seminars centred on behaviour and culture supervision. Led by the DNB's executive management and attended by key financial sector stakeholders, these forums serve as platforms to discuss and advocate for a heightened focus on behavioural aspects in the whole financial sector.[433]

3.3.3. *Further Elements*

134 Another notable and novel outcome of post-crisis efforts to rebuild trust in the Dutch banking sector is the banker's oath, as previously mentioned.[434] Instituted in 2013, it initially mandated directors and supervisory directors of Dutch-seated banks to swear a banker's oath or make an equivalent affirmation. Subsequently, in 2015, this obligation was extended to encompass all employees within the Dutch banking industry, totalling over 87,000 individuals.[435] The Netherlands distinguished itself as the first jurisdiction to legislatively impose such a requirement. By taking the oath, individuals commit to a set of conduct rules, with the paramount consideration being the interests of clients.[436] A breach may result in disciplinary action, not by the DNB or the AFM but rather by the Dutch Banking Disciplinary Committee (*Tuchtcommissie Banken*), which was installed to exist separately from the governmental setup.[437] Presently, the banker's oath does not (anymore) specifically target senior management, yet its further exploration is warranted given its novelty and uniqueness, especially with regards to the enforcement setup and its means as an approach to tackle the persisting conduct issues in the banking sector.

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432 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.27.

433 Khan, IMF Working Paper 2018, 33.

434 See n 121 of this thesis for the integration into the model and n 240-242 for details on this aspect.

435 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.06, 18.08, the oath has since also been extended to certain further employees of the financial industry, see cited source for details.

436 Loonen/Rutgers, JBR 2016, 3.

437 NVB, Toekomstgericht Bankieren, Gedragsregels, 8. See also n 418 et seqq. of this thesis for a further discussion of this aspect.

3.3.4. *Reception of the Dutch Approach*

3.3.4.1. Internationally

The DNB's novel approach has garnered significant international interest, positioning the institution as a thought leader in culture in general and more specifically in behaviour and culture supervision.[438] Regarded as one of the pioneering examples of shaping behavioural supervision, the DNB's methodology is discussed in global academic literature and publications of international bodies.[439] The FSB's working group on governance frameworks, for instance, benefitted from DNB's leadership through a literature study and scientific review within the culture work initiative.[440] Certain elements of the Dutch approach are featured as exemplary examples in the FSB toolkit, and the banker's oath has been cited by the G30 as an example.[441] The IMF praised the Dutch oath, citing it as a compelling example of appealing to individuals' moral compass, especially recognising its enforceability.[442] 135

In its role as a thought leader, the DNB extended support to international and national supervisors in developing behaviour and culture supervision approaches. Notably, the DNB contributed to the evolution of behaviour and culture in the European banking supervision context and assisted the Central Bank of Ireland in conducting behaviour and culture assessments for the five largest Irish retail banks.[443] While Australia and Japan adopted similar banker's oaths, sometimes voluntarily, the Dutch model remains the most popular, largely because it is enforceable.[444] As of now, there has been no indication of 136

438 Raaijmakers, DNB Supervision of Behaviour and Culture, 14; Llewellyn, Oxford Handbook Central Banking, 524; Walker, Seattle U. Law Rev. 2020, 725; Held/Noone, Seattle U. Law Rev. 2020, 701; Conley et al, Cornell Int. Law J. 2019, 779, Takor, IJCB 2021, 63 et seq.

439 Khan, IMF Working Paper 2018, 31; For international literature see e.g. Walker, Seattle U. Law Rev. 2020, 749 et seqq.; Conley et al, Cornell Int. Law J. 2019, 773-821; Thakor, IJCB 2021, 49, 63 et seq.; 66; Held/Noone, Seattle U. Law Rev. 2020, 701 et seq.; Hopt, Culture and Ethics in Banking, 75-84; Zaring, Seattle U. Law Rev. 2020, 558 et seq.; 569 et seq.; 572; Llewellyn, Oxford Handbook Central Banking, 524; with regards to international bodies the approach is e.g. discussed in Khan, IMF Working Paper 2018, 29 et seqq.; FSB, Toolkit 2018, 71; FSB, Stocktake 2017 17 et seq.

440 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.36; cf. also n 87 et seqq. of this thesis on the FSB's developments.

441 See e.g. FSB, Toolkit 2018, 47, 70, 71; G30, Report Conduct and Culture 2018, 27.

442 Lagarde, IMF Accountability 2015; IMF, Netherlands Country Report 2017 no. 17/96, n 33; see fn 369 of this thesis for a brief definition of the IMF as an organisation.

443 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.36.

444 Zaring, Seattle U. Law Rev. 2020, 571; Loonen/Rutgers, JBR 2016, 3.

Switzerland referencing the Dutch approach or similar in reference to its financial market supervision. With regards to culture in general, the topic is sometimes addressed by FINMA in press releases following enforcement procedures against banks, and recently explicitly raised concerns about the culture of a bank and the behaviour of its executive management.[445] Following the emergency takeover of Credit Suisse by UBS, a member of the Federal Council asserted that cultural errors in banks cannot be eliminated through regulation.[446]

137 The Dutch approach was also subject to negative feedback, a sentiment not unexpected given the technocratic nature of the sector.[447] Some doubt the ability of financial supervisors or regulators to initiate cultural change, suggesting that focusing on culture and ethics represents a regulatory compromise in response to an industry that frequently resists compliance.[448] Concerns are raised about the feasibility of developing collaborative co-regulation based on mutual trust with the government, given perceived power dynamics between regulators and the regulated.[449] Additionally, the banker's oath has been viewed critically.[450]

3.3.4.2. Nationally

138 Within the Netherlands itself, the DNB has noted heightened awareness among the boards of financial institutions regarding group dynamics and the impact of behavioural patterns on business. Changes observed include increased accountability of management by supervisory boards for behaviour and culture, the direct addressing of sensitive issues, and interventions in cases of ineffective leadership dynamics. The DNB also reports strengthened governance structures through behavioural interventions. Financial institutions are shown to independently follow up on assessment findings, displaying a growing awareness of behaviour and culture as critical drivers of firm per-

445 Cf. FINMA, Press Release CS Observation 20.10.2021, 2.

446 See HÄBERLI/SCHÄFER, Keller-Sutter Interview NZZ 25.3.2023, where the statement is referenced which was originally made during the press conference of the Federal Council from 19.3.23 on the emergency takeover. The press conference is available online (without transcript).

447 CONLEY ET AL, Cornell Int. Law J. 2019, 820.

448 See e.g. ZARING, Seattle U. Law Rev. 2020, 561.

449 CONLEY ET AL, Cornell Int. Law J. 2019, 816.

450 ZARING, Seattle U. Law Rev. 2020, 560; see also HOPT, Culture and Ethics in Banking, 79-82 for an overview on the critical discussion of the banker's oath.

formance.[451] On a general level, the supervision of behaviour and culture is seen to enhance financial supervision effectiveness, providing a more complete picture of the problem and facilitating more effective interventions.[452] An independent evaluation supports the DNB's methodology, with experts appreciating its operationalisation of soft behavioural and cultural aspects into measurable variables.[453]

However, there is also criticism on a national level, particularly towards the oath. Doubts linger regarding its effectiveness in promoting moral behaviour within the financial industry.[454] The accompanying disciplinary system faces criticism for potentially inadequately addressing bank culture issues and lacking legal certainty due to broad sanctioning principles.[455] Concerns extend to the system's perceived ineffectiveness in responding to failures in banking matters as it focuses on lower-level policy contributors. Thereby, higher-level policy and decision-making issues are excluded in its purview, despite these employees acting in the context of the policies, reporting lines and management oversight. However, in setting up this system, it was considered that senior management was already subject to the financial market regulations, such as through the subsequent fit and proper requirements.[456] 139

451 Raaijmakers, DNB Supervision of Behaviour and Culture, 18; Nuijts, Governance of Financial Institutions, Chap. 17 n 17.28.

452 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.29.

453 Raaijmakers, DNB Supervision of Behaviour and Culture, 16. The study was conducted amongst board members of financial institutions, leading experts and other stakeholders such as the Ministry of Finance, see cited page for details.

454 Loonen/Rutgers, JBR 2016, 4 et seq.

455 Soeharno, JIBLR 2021, 131; see also the same author, Financieel Recht 2014, 243-251.

456 Soeharno, JIBLR 2021, 131, 133.

III. Conclusions

140 In this part, the study has embarked on an explorative journey to understand the evolving role of senior management within prudential corporate governance frameworks of banks against their intricate economic backdrop. The dissecting of the foundational concepts of corporate governance highlighted its dynamic and multifaceted nature. It has been shown to be a complex mix of legal and economic elements, interwoven with political processes. This blend of disciplines underscores the adaptability and contextual variability of corporate governance definitions and practices. Corporate governance was found to be concerned with the company's direction and control. More specifically it involves structures and processes that guide and control company operations, focusing on decision-making and power distribution within a corporation. It aims to align interests of owners and managers and plays a crucial role in addressing the challenges of ownership and control in modern corporations.

141 As the examination transitioned to a focus on banks, it was found that these entities are characterised by their pivotal role in the economy. The distinctive nature of these institutions, involving aspects like their high leverage, opacity of balance sheets, their broad array of stakeholders, and the tight-knit web of regulation around them, necessitate a governance approach tailored to their unique characteristics. This necessity is further amplified by the systemic importance of banks, making their governance not just a corporate concern, but a matter of public interest and economic stability. It was found that the traditional models of corporate governance require adaptation to effectively address the unique challenges posed by and in banks. However, from an economic perspective, the empirical research on these special characteristics remains rather scarce, which is why the *how* of this adaption is difficult to pinpoint. Nevertheless, from a legal perspective, prudential corporate governance, as a tool for the supervision and regulation of banks, has emerged. In this context, the concept is adapted as a means to help achieve the broader objectives of prudential regulation, aiming to safeguard depositors and the stability and soundness of the entire financial system.

142 The BCBS guidelines "Corporate Governance Principles for Banks" were identified as the core international guidance on the topic. They shift from shareholder-primacy, a key feature of the traditional corporate governance view, to prioritising depositor interests. The significance of senior management is already underscored in the BCBS' definition of corporate governance, according

to which it sees it as determining the distribution of authority and responsibility through which a bank's activities and business are managed by its governing bodies. Senior management was herein defined as encompassing both the supervisory board and executive management of a bank. The central concept of these principles is to guarantee that senior management in each bank is committed to implementing effective governance practices. This objective is met by defining the separate functions of the supervisory board and executive management, thus improving the bank's comprehensive system of checks and balances.

143 The focus of these principles is largely on the framework, organisation, expectations, and distribution of duties, especially regarding the board of directors, but also executive management. The reciprocal influence of senior management and prudential corporate governance was observable in these guidelines, as the principles do not only impose requirements on senior managers through the framework, but also clearly acknowledge the senior management's responsibility for its successful implementation. Regarding the board of directors, it is established that this body bears overall responsibility for the bank, including corporate governance, culture, and the oversight of management's execution of strategic objectives. It needs to establish organisational structures, a code of conduct, select and hold accountable the executive board members, and define and adhere to their governance structures and practices. The principles are less extensive regarding the executive management, which must execute and oversee the bank's activities as per the board of director's direction, ensuring alignment with approved business strategies and policies. This body is responsible for the bank's prudent day-to-day management and must demonstrate conduct that contributes to sound corporate governance. They set forth detailed personal requirements for senior management, underscoring the necessity for qualifications, understanding of governance roles, and effective day-to-day management. Additionally, the standards highlight the role of supervisors in guiding, assessing, and regularly interacting with these governing bodies to ensure their effectiveness and adherence to prudential governance practices.

144 Todays' prudential corporate governance framework is largely shaped by the lessons learned from the global financial crisis of 2007-2009. Examining the practical impact of governance frameworks reveals that despite efforts to enhance such, instances of high-profile misconduct have persisted in the post-global financial crisis era. These situations often exemplify traditional corporate governance challenges. This prompted calls for a refined understanding of governance to evolve and to reshaping perceptions of senior management's

role and influence within these frameworks. From an international perspective, a significant paradigm shift in regulatory focus was observed, pivoting from institutional oversight to scrutinising individuals and especially their accountability, and moving from technocratic regulations to integrating softer aspects, such as conduct and culture, into financial market supervision.

145 Generally, international bodies have been actively engaged in discussions on these challenges in the post-global financial crisis era and with increased focus since around 2015, emphasising the necessity of robust governance frameworks, personal accountability, and cultures fostering ethical conduct. These dialogues underscore the growing realisation that while regulations provide structure, the efficacy of governance hinges significantly on cultural norms and individual behaviours within institutions. International bodies aimed to disseminate potential tools, offer scientific backgrounds of issues and instruments, and stimulate global dialogue to concentrate attention on the issue with a preference for enhancing understanding and collaboration. Notably, these discussions and subsequent actions have arisen not from a specific banking or financial crisis, traditionally the catalyst for regulatory discourse and reform, but from a recognition of the severity of ongoing issues.

146 More specifically, at national level, emerging approaches have been identified to address the persisting challenges. This herein established terminology has been chosen to underscore the innovative aspects of these methods. The United Kingdom's (UK) Senior Managers and Certification Regime (SM&CR) and the Netherlands' focus on behaviour and culture stand out as exemplary models. The UK's traditional approach prioritises individual accountability and clear delineation of managerial responsibilities, while the Netherlands' novel approach concentrates on the behavioural and cultural aspects of governance, such as organisational culture and leadership behaviour. Both systems were considered to be fluid to some degree, with the UK also addressing cultural issues and the Netherlands employing traditional supervisory tools as needed. These innovative systems were found to build upon established corporate governance frameworks and fit and proper requirements for individuals, adding new dimensions to enhance effectiveness. Both introduce diverse methodologies in response to the evolving and complex nature of governance challenges in banking. Switzerland already acknowledged some of these developments. The forthcoming analyses will delve deeper into the Swiss method of regulating and supervising senior management, exploring it through the lens of the supervisory law life cycle along the phases of authorisation, ongoing supervi-

sion, and enforcement. Subsequently for each respective phase, the emerging approaches adopted in the UK and the Netherlands will be presented to illustrate the spectrum of further possibilities in this regard.

Part 2: Requirements and Authorisation

Departing from the previously international view, from this part on the research transitions to a focus on the Swiss perspective. It begins with an outline of the framework in Switzerland and a historical analysis of senior management's role in the evolution of pertinent provisions. Thereby, a thorough understanding of today's legal framework is fostered. Further elaborating this framework, the relevant requirements are then dissected from their embedment in the bank licensing requirements and examined in detail. Their initial critical assessment by the supervisory authority is conducted in the authorisation process, which constitutes the initial phase of the supervisory law life cycle. This part examines how the relevant individuals are involved in this process, including the subsequent legal consequences. Afterwards, results on the Swiss setup are presented, followed by an exploration of the corresponding emerging approaches from the previously introduced model jurisdictions, the United Kingdom and the Netherlands.

Thereby, this part lays a crucial foundation for understanding the ensuing phases of the supervisory law life cycle, as in the course of ongoing supervision the continuous adherence to these requirements is monitored, moreover in a potential enforcement phase the non-compliance with such is addressed.

I. Analysis

A. Identified Legal Framework Towards Senior Management

1. Foundations

1.1. Outline

147 The analysis starts with an outline of the legal framework concerning the requirements of senior management of systemically important banks in Switzerland and its historical context. Thereby, a foundation is built before these requirements will be analysed in light of the authorisation process as an element of the supervisory law life cycle. The starting point for this outline constitutes the requirements of the institutional licensing obligation, which are foreseen in the Banking Act (BankA) and the corresponding Banking Ordinance (BankO).[457] The necessary prerequisites are commonly summarised into three broad main categories: organisational requirements (cf. BankA 3 II a); capital requirements (cf. BankA 3 II b); and requirements regarding key personnel (cf. BankA 3 II c).[458] Generally, these are specified by further provisions. The organisational requirements are accompanied by a section in the Banking Ordinance ("Organisation of Banks", BankO 9-14) and elaborated in FINMA-Circulars, particularly in FINMA-Circ. 17/1 "Corporate Governance – Banks".[459] Regarding capital requirements, there are further norms in the Banking Act itself (cf. especially BankA 4 et seqq.), in the Banking Ordinance ("Capital Requirements", BankO 15-17), and they are specified in additional ordinances and multiple FINMA-Circulars.[460] Regarding key personnel, BankA 3 II c is supple-

457 Regarding the licensing obligation of banks in general cf. NOBEL, § 7 n 101.

458 STALDER, Bankgeschäft, 249; KUNZ, § 3 n 554.

459 For an overview on the organisational requirements including the further accompanying provisions see e.g. NOBEL, § 7 n 146-168, STRASSER, Finanzmarktaufsicht, § 17 n 9-24; for a discussion in the herein relevant context see n 149 et seq., 183-191 of this thesis.

460 The additional ordinances being the "Ordinance concerning Capital Adequacy and Risk Diversification for Banks and Securities Traders (Capital Adequacy Ordinance, CAO)" and the "Ordinance concerning the Liquidity of Banks and Securities Firms (Liquidity Ordinance, (LiqO)". For a more detailed overview on the capital requirements see e.g. STALDER, Bankgeschäft, n 255-259.

mented by one norm in the Banking Ordinance (cf. BankO 8). It specifies which documents must be submitted to the supervisory authority in the course of the licensing process. BankA 3 II c also constitutes one of the legal foundations of FINMA-Circ. 17/1.[461]

Consequently, senior managers are not subject to direct regulatory requirements or an individual license; rather, their regulation is governed by the institutional license. Thereby, a framework following dual-perspective strategy for the regulation and supervision of senior management is identified. As will be outlined in the following, senior management is influenced by both organisational requirements, which shape its structure and establish a general setup, as well as personnel requirements, which set certain standards for these individuals. 148

1.2. Organisational Requirements

The Banking Act and its corresponding Banking Ordinance establish organisational framework conditions for banks and their corporate bodies (BankA 3 II a in conjunction with BankO 11).[462] The organisational requirements, the first element of the dual-perspective strategy, lay the foundations for corporate governance and indirectly influence senior management by governing their setup.[463] Of further relevance are several provisions of the FINMA-Circ. 17/1 "Corporate Governance – Banks", which is, *inter alia*, based on aforementioned organisational provisions.[464] Accordingly, FINMA understands corporate gov- 149

461 For an overview on the irreproachability guarantee as a licensing requirement see e.g. NOBEL, § 7 n 172 et seq.; for a discussion in the herein relevant context see n 151 et seq., 192-205 of this thesis. See also FINMA-Circ. 17/1, n 16, 51 for the referred provisions in this Circular.

462 This section only presents a brief overview in order to outline the current framework. For a further discussion of these requirements see n 183-191 of this thesis.

463 For an explanation of corporate governance in a general manner see n 20-26, 30-35 and specifically for banks see n 36-50 of this thesis.

464 Cf. FINMA-Circ. 17/1, n 1; furthermore, it mentions BankA 3b-3f, 4^{quinquies}, 6 and BankO 12 as relevant legal bases, along with further acts and ordinances, such as e.g. FINMASA. FINMA-Circulars are a means of FINMA's regulatory powers (cf. FINMASA 7 I). Through such, the supervisory authority sets out its own supervisory practice and describe its interpretation of the applicable laws and ordinances to create legal certainty and ensure efficient application, see FINMA, Guidelines on Financial Market Regulation, principle 2. Thereby, FINMA-Circulars concretise the underlying provisions, but cannot alter them. They constitute administrative instructions by which do not bind the courts. Nevertheless they must be considered by such, granted that the Circular permits an interpretation of the applicable statutory provision which is adapted to the individual case, cf. e.g. FAC decision B-1048/2018 from 19 May 2020 consid. 7.1.

ernance as "[…] *the principles and structures on the basis of which an institution is directed and controlled by its governing bodies.*". This understanding is clearly reflected in the Circular, as it installs a certain organisational setup in banks.[465] The document structure follows the separation between the board of directors and executive management, and subsequently specifies BankA 3 II a.[466] Furthermore, it assigns relevant tasks and responsibilities to the different corporate bodies and specifies their composition.[467] It is part of FINMA's strategic goals to promote responsible corporate governance in dialogue with the industry, particularly by exerting influence on the composition of governing bodies and the organisation of decision-making and control processes.[468]

150 It is worth noting that the organisation of banks as a corporation is naturally addressed in other legal fields, especially in company law placed within the Swiss Code of Obligations (CO).[469] This gives rise to parallels and discrepancies between both fields, notably regarding internal organisation, where the Banking Act places special emphasis and is generally considered more detailed compared to the rather rudimentary regulation in the Code of Obligations.[470] This is particularly evident in the instalment of a dualistic organisational structure which goes beyond the scope of company law.[471] There is also a historical reason for their interconnectedness: the Banking Act was developed alongside the revision of the company law in 1936, preceding its enactment. Consequently, the Banking Act aligns with the joint-stock company model and references company law in various provisions.[472] For banks with this legal form, the provisions of the Banking Act are generally considered *lex specialis* to company law.[473] Nevertheless, this specialisation does not imply complete isolation from company law influence. If the Banking Act's provisions allow for interpretation, company law's interpretive influence can affect their application (so-called dif-

465 Cf. FINMA-Circ. 17/1, n 9-51.

466 Cf. for example FINMA-Circ. 17/1, n 9-46 and n 47-50.

467 FINMA-Circ. 17/1, n 1, 2. The Circular inter alia also covers the topics of risk management, internal control system, and internal audit. It also applies to securities firms, financial groups and financial conglomerates dominated by banking or securities trading.

468 FINMA, Strategic Goals, 9.

469 KUNZ, § 3 n 117.

470 KLEINER/SCHWOB, SK BankA 3 n 20; NOBEL, FS von der Crone, 638 et seq.

471 BAUER, EF 2021, 612; NOBEL, § 7 n 151; KUNZ, § 3 n 537 et seq.; see also n 183 et seq. of this thesis for a further discussion.

472 NOBEL, § 7 n 45, who mentions the examples of the liability provision in BankA 39 (with reference to CO 752-760) or the provision regarding financial reporting see BankA 6 III (with reference to title 32 of the CO, see CO 957 et seqq.).

473 WINZELER, BSK BankA 3, n 3; KLEINER/SCHWOB, SK BankA 3 n 19.

ferentiated specialty).[474] FINMA primarily focuses on the special legal provisions in the Banking Act, which are intended to complement the Code of Obligations in terms of protective supervisory objectives.[475] Moreover, corporate governance is specified by self-regulation or further guidelines, such as the "Swiss Code of Best Practice for Corporate Governance" from Economiesuisse (the Swiss business federation from all sectors of the economy), addressing publicly listed companies and serving as voluntary guidance for all other forms of companies.[476]

1.3. Personnel Requirements

Regarding the *personnel requirements*, which constitute the second element of the dual-perspective strategy, BankA 3 II c requires that: "*The persons responsible for the administration and management of the bank must enjoy a good reputation and provide a guarantee of irreproachable business conduct.*".[477] As previously indicated, specifying norms or other supplementary guidance on this requirement are scarce. The only directly accompanying provision in the Banking Ordinance regards a list of documents that have to be submitted to FINMA in order for the authority to assess the fulfilment of this licensing requirement.[478] In the FINMA-Circ. 17/1 (for which BankA 3 II c constitutes one of the legal bases), the specifications are not easily observable, yet some elaborating aspects can be found in it.[479] Specifically with regards to senior management, FINMA communicated in 2015 that the assessment of the quality of the 151

474 Emmenegger, Bankorganisationsrecht, 197.

475 Branson, FINMA Corporate Governance 2015, 2; FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 7.

476 Kunz, § 3 n 119; Economiesuisse, Code of Best Practice, 6; the principles aim at guaranteeing transparency and a healthy balance of management and control while maintaining decision-making capabilities and efficiency. They concern aspects of shareholders, board of directors and executive board, disclosure, audit as well as compensation, put great emphasis on flexible implementation and follow the approach of comply or explain, see 9-20. Though voluntary, the content of the code can be taken into account by the courts, cf. e.g. FSC decision 2C_771/2019 from 14 September 2020 consid. 19.2.3. In a broader understanding of corporate governance the SIX "Directive on Information relating to Corporate Governance" (SIX-DCG) can also be considered relevant. It applies to issuers whose equity securities have their primary listing on SIX Swiss Exchange (SIX-DCG 2), which are subsequent to specific disclosure obligations. The comply or explain principle (SIX-DCG 7) applies to the disclosure of the information. Regarding the comply or explain principle see also fn 327 of this thesis.

477 This section only presents a brief overview in order to outline the current framework. For a further discussion of this requirement n 192–205 of this thesis.

478 Cf. BankO 8.

479 Cf. e.g. FINMA-Circ. 17/1, n 17.

corporate bodies, and hence the individual's guarantee for irreproachable business conduct, is a key focus of FINMA's supervision and is even considered of equal importance as the evaluation of an institution's financial stability.[480] While not directly linked to the irreproachability guarantee, but still relevant in the context of personnel requirements, is the provision that members of the executive board must be domiciled in Switzerland.[481]

2. Historical Context

2.1. Relevant Norms in the Banking Act

2.1.1. *Early Discussions*

152 The original enactment of the Banking Act in 1935 had a preceding history that spans over 20 years. As with many legal provisions in financial market law, its origin can be traced back to a crisis. The starting point was the severe disruption in the Swiss banking industry between 1910 and 1914, affecting approximately 50 institutions. The consequences were losses, payment difficulties, emergency mergers, liquidations, and deposit losses experienced by bank clients. As at that time banks were, like other firms, subject to the control provisions of the Code of Obligations, the need for a Banking Act was recognised. Subsequently, Professor Landmann was mandated with preparing a preliminary draft of the Banking Act, known as the "Landmann Report" (hereinafter also: the report).[482]

153 The report identified "frivolous" breaches of duty, fraud, embezzlement, and forgery as reasons for the collapses of various banks. Notably, these issues were predominantly attributed to incorrect organisational structures and ineffective management practices. Inadequate control mechanisms, reckless lending practices, insufficient resource acquisition, and improper allocation of funds were highlighted as significant concerns, indicative of an "amateurish" organisation and management of banks. The absence of well-defined competencies and a lack of effective oversight significantly contributed to the poor organisational performance.[483]

480 Branson, FINMA Corporate Governance 2015, 4. For a definition of senior management in the herein context see n 64-66 of this thesis.
481 Cf. BankA 3 II d in conjunction with BankO 10.
482 Müller, BSK BankA n 5 Einleitung.
483 Landmann, Entwurf BankA 1916, 17.

Based on these findings, the report suggested introducing a licensing obligation for firms which want to engage in banking activities. The granting of such a license would be contingent, among other things, upon the bank's management having civic honourability (*bürgerliche Ehrenfähigkeit*) and a good repute (*guten Leumund*). However, the introduction of a licensing obligation, and especially its personnel requirements, were rejected by the Finance and Customs Department (*Finanz- und Zolldepartement*, today: Federal Department of Finance, FDF), which forced Landmann to seek alternatives.[484] Landmann remained committed to his idea of establishing an obligation to obtain a license, however adjusted the draft so that it did not encompass personnel requirements. Instead, as a substitute he proposed a liability of supervisory board members, which required a precise definition of the scope and content of the supervisory board's duties.[485] 154

The strong emphasis on the proper organisation of a bank was subsequently reflected in Landmann's proposed legislation.[486] Due to significant opposition from the industry and shifting priorities brought about by the First World War, the preliminary draft was not published nor officially further pursued and consequently Switzerland was left without specific banking regulation. Nevertheless, it is acknowledged that the report remained relevant for the subsequent development of the Swiss Banking Act.[487] 155

2.1.2. *First Banking Act*

2.1.2.1. Rationale and Objective

The legislative work for a Banking Act was resumed after the collapse of the New York stock exchange in 1929, which resulted in a world economic crisis that also heavily affected Switzerland and its banks.[488] This, again, put the banks' management into the spotlight, as improper and unscrupulous bank management were identified as main causes for the failures of the institutions.[489] It was already recognised at that time that the fate of a bank, besides 156

484 Bischof, n 150 et seq.; Aellen, 34, both with further references.

485 Landmann, Entwurf BankA 1916, 81 et seq.

486 Cf. Landmann, Entwurf BankA 1916, 2-4; see also Aellen, 34-36.

487 Müller, BSK BankA n 5 Einleitung; see also Aellen, 12-13, 39, who notes that especially Landmann's proposals regarding the organisational structure of a bank and the interplay between stringent liability and competence of the members of the governing bodies seemingly have been taken into account.

488 Müller, BSK n 5 Einleitung.

489 Aellen, 86.

the overall economic conditions, primarily depends on the individuals entrusted with management, supervision, and control.[490] Once more, the bank failures demonstrated the devastating effects of organisational deficiencies.[491] They also highlighted the issues associated with the lack of allocation of responsibilities and the missing definition of competencies.[492] It was found that banks therefore needed to organise themselves in a way that clearly defined the duties and responsibilities of the governing bodies.[493]

157 Whilst the Federal Gazette concerning the first Banking Act did not mention the Landmann Report, it is clear that the legislative draft followed the structure and, to some extent, the substance of the preliminary draft.[494] On 8 November 1934 the Swiss Banking Act was approved by the Swiss parliament and it came into force on 1 March 1935.[495] It is noteworthy that the Banking Act has never included a purpose clause. Initially, its primary intent was perceived as ensuring the protection of depositors. However, today there is consensus that it also serves the functional protection of the banking system, thereby pursuing a dual objective.[496] Consequently, the ensuing discussion of the norms should be contextualised within the scope of these dual objectives.

2.1.2.2. Organisational Requirements

158 The Banking Act aimed to establish general principles for sound organisational structure and to clearly define responsibilities of different corporate bodies. By implementing effective control and supervision, irregularities in bank management should be prevented.[497] A crucial aspect was the explicit delineation of business scope as well as the allocation and delimitation of powers among governing bodies. These measures were deemed necessary to prevent abuse and arbitrary actions in management. Furthermore, it was recognised that the lack of well-defined competencies made it difficult to establish individual accountability. Conversely, the description of duties and the allocation of re-

490 BRÜHLMANN, Komm-BankA 1935, 42 et seq.
491 REIMANN, Komm-BankA 1963, 25.
492 BRÜHLMANN, Komm-BankA 1935, 42 et seq.
493 BBl 1934 I 179.
494 AELLEN, 17.
495 MÜLLER, BSK n 5 Einleitung; see also AELLEN, 15 et seq.
496 Instead of many see MÜLLER, BSK n 18 Einleitung; NOBEL, § 7 n 23; STALDER, Bankgeschäft, n 240; AELLEN, 86 et seqq.; see also BBl 1970 I 1145; see also FINMASA 4 which now contains the objectives of financial market supervision.
497 BBl 1934 I 175, 181.

sponsibilities to corporate bodies should make it transparent to them what they can be held accountable for.[498]

While not imposing a licensing obligation, the first Banking Act established basic principles on internal organisation, including a clear delineation of the scope of business and the setup of relevant bodies (oBankA (1935) 3).[499] This was considered one of the most important instruments for the effective management of an institution. It established the requirement regarding certain corporate documents to provide for an administrative organisation corresponding to its business activities (cf. oBankA (1935) 3 I) and installed functional and personal separations of the governing bodies (oBankA (1935) 3 II).[500] The original version of the norm remains virtually unchanged today.[501] 159

2.1.2.3. Personal Liability

Of further relevance to the herein discussed regulation of bank senior management is that the clear allocation of competencies installed through oBankA (1935) 3 aimed to facilitate individual responsibility in case of misconduct.[502] These allocated responsibilities should then be made enforceable through a specific liability, targeting the banks' governing bodies. Hence the first Banking Act included a special statutory liability provision (cf. oBankA (1935) 41).[503] Accordingly, individuals entrusted with the management or overall direction, supervision, and control of a bank were responsible to both the bank itself and its individual shareholders and depositors for the damage caused by their intentional or negligent violation of the duties assigned to them.[504] The liability provision in the Banking Act was based on the drafts of the ongoing revision of the Code of Obligations, yet the aim was to impose stricter *lex specialis* provisions to ensure depositor protection and the solidity of the banking industry.[505] 160

498 REIMANN, Komm-BankA 1963, 25, 116.

499 BBl 1934 I 184

500 REIMANN, Komm-BankA 1963, 25 et seq.; BRÜHLMANN, Komm-BankA 1935, 43.

501 Cf. oBankA (1935) 3, where the wording was only slightly different from todays' version in BankA 3 II a.

502 BBl 1934 I 184; BRÜHLMANN, Komm-BankA 1935, 42.

503 BBl 1934 I 616; cf. oBankA (1935) 41 which stated that: "*The persons entrusted with the management or with the executive, supervisory, and control functions of a bank are responsible to both the bank itself and its individual shareholders and creditors for the damages caused by their intentional or negligent breach of the duties incumbent upon them.*", see also AELLEN, 86.

504 Cf. oBankA (1935) 41.

505 AELLEN, 49; REIMANN, Komm-BankA 1963, 108. The provisions are considered stricter in the BankA as those responsible could be held accountable for any culpable violation, contrary

161 The liability provision in the Banking Act aimed to prevent individuals from evading responsibility by claiming a lack of knowledge, as this would already be considered negligence and establish personal responsibility.[506] Key personnel should thereby be encouraged to act prudently and comply with Banking Act provisions, preventing arbitrary actions and authority overreach for quicker detection of competence violations and strengthen responsibility.[507] The enhanced accountability awareness was considered a crucial safeguard for bank depositors and the stability of the banking system.[508]

162 The liability provision was the only norm directly addressing senior management in the first version of the Banking Act. Given that there was no licensing obligation at that time, there was also no room for subsequent requirements regarding key personnel.[509] The opposition successfully fought such an approach, arguing that the available assessment criteria in the course of bank licensing were insufficient, rendering it a mere formality and ultimately useless.[510] The Federal Gazette stated that the supervisory authority would inquire in advance about the moral reliability of bank founders anyways. However, as there did not exist a legal basis to do so, the supervisory authority did not in fact have competence in this regard.[511]

2.1.3. *First Revision and Onward*

2.1.3.1. Background

163 The need for revision of the Banking Act became apparent 36 years after its enactment. The trigger was a series of bank failures, most notably those of two major Swiss banks.[512] The economic boom of the 1960s led to numerous formations of new banks and the internationalisation of the banking industry in

to the liability for neglect provided for in the Swiss Code of Obligations. Furthermore, in the Banking Act, the circle of responsible persons was expanded and more precisely defined, and it included not only joint but also personal responsibility. Also, the company, as well as shareholders and creditors were granted rights to bring legal action, for details see BBl 1934 I 179; BRÜHLMANN, Komm-BankA 1935, 160; MEIER-WEHRLI, 27.

506 BBl 1934 I 180; however, not everyone seemed to follow this view, see e.g. BRÜHLMANN, Komm-BankA 1935, 161.

507 AELLEN, 86; BRÜHLMANN, Komm-BankA 1935, 43.

508 BRÜHLMANN, Komm-BankA 1935, 160; BBl 1934 I 175, 179.

509 AELLEN, 44.

510 AELLEN, 45.

511 BBl 1934 I 171; AELLEN, 46-48.

512 BBl 1970 I 1145; MÜLLER, BSK n 6 Einleitung; the two major banks being the Banque Genevoise de Commerce et de Crédit and the Schweizerische Spar- und Kreditbank.

general. Many bank executives were ill-equipped to handle the increasing competition and pressure, resulting in a rise in risky speculations and involvement in dishonest practices.[513] As a result, deficiencies in the existing legislation became evident, particularly the absence of a licensing obligation and the lack of tools for the supervisory authority to intervene.[514] Consequently, as part of this revision, which came into effect through several partial instalments between 1971 and 1975, the licensing obligation for banks was introduced.[515]

2.1.3.2. Development of Organisational Requirements

The organisational provisions, which were previously established with the original enactment of the Banking Act (cf. oBankA(1935) 3 I and II), were integrated as part of the licensing requirements and consolidated with only minor changes to the wording (cf. oBankA (1975) 3 II a).[516] This provision remains in effect to this day, while now being further specified by BankO 11.[517] 164

2.1.3.3. Establishment and Development of Personnel Requirements

a. Guarantee for Irreproachable Business Conduct

As an additional licensing requirement, the guarantee for irreproachable business conduct was implemented with the first revision.[518] Until then, positions in governing bodies of banks were generally open to anyone.[519] With the implementation of the irreproachability guarantee, it was established that "*The persons responsible for the administration and management of the bank must enjoy a good reputation and provide a guarantee of irreproachable business conduct.*" (cf. oBankA (1975) 3 II c).[520] While there was no direct reference to the Landmann report, it is evident that this provision is based on his proposal.[521] 165

513 AELLEN, 29.
514 AELLEN, 30; BBl 1970 I 1145.
515 BBl 1970 I 1150.
516 BBl 1934 I 602; BBl 1970 I 1150, 1166, 1190; cf. n 158 et seq. of this thesis for the previous version.
517 Cf. BBl 1970 I 1190 and todays BankA 3 II a.
518 MÜLLER, BSK n 5 Einleitung.
519 AELLEN, 86.
520 Cf. oBankA (1975) 3.
521 BISCHOF, n 152, with reference to AELLEN, 38.

Today, the irreproachability guarantee remains in its original wording according to its first enactment.[522]

166 The legislator saw a necessity in ensuring that the bank is led by individuals who show reliable character and are professionally competent, as such individuals hold positions with potential implications for both individual clients and the broader financial system.[523] The provision was set up for the supervisory authority to proactively address and take action against incompetent, unreliable or unethical governing body members, while it was previously only possible to intervene after the damage had occurred.[524] The responsibility for selecting members of the governing bodies was attributed to the bank.[525] The supervisory authority was however empowered to approve or veto appointments to relevant roles, to obtain information about the individual in question and to remove individuals who no longer meet the requirements.[526] By ensuring that those entrusted with bank management and oversight possess the necessary technical and ethical qualifications to fulfil their responsibilities, risks posed to the bank and its depositors should be mitigated.[527]

167 The professional and personal prerequisites installed by BankA 3 II c have a primarily preventive aim, which is also evident from the term *guarantee*, rather than a punitive one.[528] The Federal Supreme Court recognises that this provision specifically aims to ensure the trustworthiness of both banks and the Swiss financial market.[529] Similarly it was found that banks hinge on customer trust in their management, underscoring the need for competent and trustworthy leadership to uphold the Swiss financial sector's functionality and reputation.[530] Consequently, key positions in this industry demand heightened

522 Cf. oBankA (1975) 3 II c und BankA 3 II c. It should be noted that the provision insofar further developed as the irreproachability guarantee requirement for majority shareholders was introduced in the year 1995 in BankA 3 II ^{bis}, which however is not relevant for the herein discussion of BankA 3 II c.

523 BBl 1970 I 1151; Branson, FINMA Corporate Governance 2015, 4; see also Aellen, 127.

524 Aellen, 53, 86; Rhinow/Bayerdörfer, n 134; Chatton, 1201; Aellen, 91; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3.

525 BBl 1970 I 1151; see also Aellen, 127.

526 Winzeler, ZSR 2013, 439; who also notes that a bank which no longer provides the necessary irreproachability guarantee as an institution risks losing its license.

527 Lombardini, Chap. V, n 66.

528 FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.4.

529 FSC decision 2A.261/2004 from 27 May 2004 consid. 1; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3.

530 Aellen, 90; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3.

standards compared to other sectors.[531] When entrusted individuals no longer merit public trust, the interests of depositors are also at risk.[532]

Not only do certain individuals have to provide a guarantee of irreproachable business conduct, but also the institution itself as the authorised entity.[533] Over time, many further financial market laws followed suit and included similar concepts based on the one from the Banking Act, while the herein discussed irreproachability guarantee according to BankA 3 II c is considered the original irreproachability provision.[534] 168

b. Place of Residence

In the course of the revision of the Banking Act in the 1970s, it was also introduced that persons entrusted with the management of the bank must reside in Switzerland. Thereby it is ensured that the responsible individuals are reachable in Switzerland and can be held accountable if necessary.[535] Over time, the norm has been formulated more specifically and, in its present form, BankA 3 II d is complemented by BankO 10.[536] 169

c. Development of the Liability Provision

Even with the introduction of the irreproachability guarantee, the liability provision under Banking Act initially remained in effect, however it seemed to 170

531 KLEINER/SCHWOB, SK BankA 3 n 164; FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 3.1; FAC decision B-1360/2009 from 11 May 2010 consid. 3.2.1.

532 FCD 106 lb 145 consid. 2.a; for a discussion of the role of trust in banks see also n 39 of this thesis.

533 Instead of many see e.g. NOBEL, § 7 n 167; BOVET/HÉRITIER LACHAT, Surveillance, n 382; cf. FAC decision B-1048/2018 from 19 May 2020 consid. 7.2; FCD 108 lb 196 consid. 2b; FAC decision B-2204/2011 (2012/33) from 24 July 2012 consid. 10.1. Furthermore, qualified participants (BankA 3 II c^{bis}) are also required to provide such a guarantee, for details see BOVET/HÉRITIER LACHAT, Surveillance, n 378; CHATTON, AJP 2011, 1195.

534 KUHN/WYSS, Finanzmarktenforcement, 365; BERTSCHINGER, Finanzmarktaufsicht, § 11 n 37; ZULAUF, FINMA Sonderbulletin 2013, 13; CHATTON, AJP 2011, 1195. Cf. e.g. BOVET/HÉRITIER LACHAT, Surveillance, n 368-373 for an overview on the different irreproachability guarantees in Swiss financial market law. See e.g. also FinIA 11 I and II or CISA 14 I a and a^{bis}, as examples of further irreproachability guarantee provisions.

535 BBl 1970 I 1151; accordingly, members of the executive body, who were not residents of Switzerland only were allowed for collective signing jointly with a member of the executive body who resided in Switzerland.

536 Cf. oBankA (1975) 3 II d and BankA 3 II d.

have brought little avail.[537] With its introduction through the first Banking Act of 1935, the legislator held that it aimed for stricter liability provisions for bank executives than those in the Code of Obligations. In the 2000s, however, the legislator stated that there's no need to treat bank executives differently from such executives in other joint-stock companies and that the *lex specialis* liability provision in the Banking Act did not differ significantly from that of the one in the Code of Obligations. Consequently, in a revision in 2006, the specific statutory provision was repealed and replaced it with a reference provision.[538] As a result, BankA 39 today simply refers to the company law provisions governing liability for corporate bodies (and others) under CO 752-760.

2.2. FINMA-Circular "Corporate Governance – Banks"

2.2.1. *Development of the Circular*

171 As previously noted, the FINMA-Circular "Corporate Governance – Banks" (FINMA-Circ. 17/1) constitutes another important piece in the framework governing senior management. Antecedents of the current FINMA-Circ. 17/1 potentially have existed for quite some time. Already in 1936, guidelines were established on the participation of the president in the affairs of board committees and summarised in a Circular.[539]

172 FINMAs predecessor, the Swiss Federal Banking Commission (FBC, *Eidgenössische Bankenkommission*), established FBC-Circ. "Supervision and Internal Control" (FBC-Circ. 06/6, *Überwachung und interne Kontrolle*) in 2006, which accounts for as a definite precursor of the current FINMA-Circ. 17/1.[540] Already then, FBC recognised the significant importance of internal monitoring and control. It associated aspects of good corporate governance with its supervisory objectives and attributed the responsibility for adequate control and monitoring to the board of directors. Generally, it saw the necessity of the banking and financial sector to take on a leading role in this area, partly due to

537 NOBEL, FS von der Crone, 639; see n 160-162 of this thesis for the introduction of the personal liability.

538 Cf. the statement in the course of the implementation of the norm in BBl 1934 I 179, versus the later statement in BBl 2002 8105 et seq. and the latter reference in detail.

539 REIMANN, Komm-BankA 1963, 133.

540 FBC, Press Release Circular 4.10.2006. This Circular combined the FBC-Circular "Internal Audit" (FBC-Circ 95/1, *Interne Revision*) and the "Guidelines on Internal Control" (*Richtlinien zur internen Kontrolle*) of the Swiss Banking Association (SBA, *Schweizerische Bankiervereinigung*) and expanded upon them.

its significant economic importance and complex risks.[541] Subsequently, FBC-Circ. 06/6 was later incorporated into the FINMA-Circular "Monitoring and Internal Controls for Banks" (FINMA-Circ. 08/24, *Überwachung und interne Kontrolle Banken*) with only minor adjustments and published in 2009.[542] This Circular, together with its accompanying relevant FAQs and provisions contained in others, form the basis for the current FINMA-Circ. 17/1.[543] In its present form the FINMA-Circular "Corporate Governance – Banks" (FINMA-Circ. 17/1) was implemented in July 2017 and has not been subject to significant material changes since.[544]

173 The revision which led to the publication of the current version of FINMA-Circ. 17/1 was based on the lessons learned from the global financial crisis of 2007-2009 and sought to incorporate new insights in the field of corporate governance. Weaknesses in corporate governance and the lack of expertise in risk management and mitigation were cited by FINMA as contributing factors to the crisis.[545] It was also with the last revision that the supervisory authority explicitly departed from the previously applied comply or explain principle. It considered the approach generally unsuitable for governmental regulation, and the consistently applied principle of proportionality was considered to provide enough flexibility.[546] This suggestion in the relevant draft was opposed as, among other things, it was seen as an unintended shift in the burden of proof and an unnecessary increase in costs, and the Circular was considered too detailed and too formalistic.[547] In response, FINMA maintained its position regarding mandatory compliance with the Circular; it did however structure and formulate it in a more principle-based manner and reduced thresholds for certain requirements.[548]

541 FBC, Vernehmlassung 2005, 1 et seq.

542 Emmenegger/Kurzbein, GesKR 2010, 467; FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 4

543 FINMA, Press Release Guidelines 1.11.2016, 1; FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 6 et seq. Regarding the legal qualification of FINMA-Circulars see fn 464 of this thesis.

544 Cf. FINMA-Circ. 17/1, n 14, where it is also stated that the last amendments were made because of the implementation of FinIA and FinSA.

545 FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 6.

546 FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 10; FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 7.

547 FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 6.

548 FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 7.

174 Another reason for the revision of the previous Circular was the aim to align the Swiss provisions with international developments, especially the increased requirements of the "Corporate Governance Principles for Banks" of the BCBS and the "Principles of Corporate Governance" of the G20/OECD (both in their 2015 versions).[549] The supervisory authority deems the provisions in FINMA-Circ. 17/1 congruent with these international global benchmarks, to the extent permissible under prevailing legal constraints.[550]

175 The draft for the current version of the Circular also proposed that the interests of depositors at the individual institution level should take precedence over divergent shareholder or group interests, an approach which is installed by the BCBS principles.[551] The integration of the primacy of depositor interests was however opposed and FINMA followed the criticism suit. The authority also stated that the primacy of depositor interest fundamentally interferes with the group structure, for which the normative basis of a mere Circular is insufficient.[552] To this day, the interests of depositors in general are not explicitly mentioned in the Circular. This contrasts with the clear communicated efforts to align the document with international standards and the goal of the Banking Act to ensure depositor protection.[553]

2.2.2. *Development of Relevant Provisions*

2.2.2.1. Board of Directors

176 As mentioned earlier, the board of directors has been considered responsible for adequate oversight and control of the bank since FBC-Circ. 06/6, which came into force in 2007. Therefore, already then, *requirements* were imposed on this body. The board of directors as a collective had to fulfil the necessary

549 FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 6, 8. Furthermore, within the scope of the revision, criticism points from the IMF assessment were also addressed, which recommended improving various aspects of risk management, see FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 6 et seq. For an overview on the guidelines see n 59-63 of this thesis and for a discussion of the relevant BCBS principles n 69-73. The BCBS principles only gain legal effect through implementation into national law, see NOBEL, § 3 n 101 et seq. and also n 51-53 of this thesis.

550 FINMA, Anhörungsbericht, 17/1 2016, 7; see also NOBEL, § 3 n 116 who highlights the importance of both of these guidelines.

551 FINMA, Entwurf FINMA-Circ. 16/xx, n 26; cf. BCBS, Guidelines 2015, n 2, which notes that "[…] *shareholders' interest would be secondary to depositors' interest.*"; see also n 59 of this thesis.

552 FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 13.

553 NOBEL, FS von der Crone, 639.

prerequisites, including expertise, experience, and timely availability. Requirements regarding the independence of the body's members were also established.[554] The independence requirements have mostly remained unchanged to this day.[555] In addition to the pre-existing requirement of sufficient professional qualifications, leadership skills were later also required, as well as an adequate diversification of skills.[556] The draft for today's Circular proposed furthermore that members of this body should enjoy a good reputation, provide a guarantee for irreproachable business conduct and possess integrity. In the final version, however, such requirements remain absent.[557]

177 *Responsibilities and tasks* of the board of directors were initially limited to the set up and effective implementation of internal control, including the establishment of an internal audit function.[558] The responsibilities were subsequently broadened.[559] The provisions for the supervisory body were further specified over the course of the revisions and ultimately in FINMA-Circ. 17/1 supplemented by more detailed guidelines on the division of tasks and committees.[560]

554 Regarding the requirements see FBC-Circ. 06/6, n 17; FINMA-Circ. 08/24, n 17; regarding the independence see FBC-Circ. 06/6, n 18-27; FINMA-Circ. 08/24, n 18-27.

555 Cf. FINMA-Circ. 17/1, n 17-25 and FBC-Circ. 06/6, n 18-27. The only significant change is the departure from the comply or explain principle, which previously applied to some provisions. For example, regarding non-compliance with the independence of members of the supervisory body could previously be justified in the annual report (cf. FBC-Circ. 06/6, n 19). Today, the principle is binding, although FINMA may grant exemptions in justified individual cases (e.g. small companies in their initial stages); see FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 11; FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 13. Regarding the comply or explain principle see also fn 327 of this thesis.

556 Cf. FINMA-Circ. 17/1, n 16 and FBC-Circ. 06/6, n 17.

557 FINMA, Entwurf FINMA-Circ. 16/xx, n 18, 34; in the consultation report (*Anhörungsbericht*) there is no explicit comment regarding the supervisory board, explaining why this requirement was removed in the final version. However, a similar proposal regarding the executive board was opposed and subsequently removed (see n 178 of this thesis for the subsequent discussion) and presumably consequently also the proposal herein.

558 Cf. FBC-Circ. 06/6, n 9-16; FINMA-Circ. 08/24, n 9-16.

559 Cf. FINMA-Circ. 17/1, n 10-15. Accordingly, they now also include business strategy and risk policy, organisation, finances, human resources, and other resources, as well as responsibility for significant structural changes and investments.

560 Cf. FINMA-Circ. 17/1, n 26-29 for the "Basic principles governing a directorship" and n 30-46 for the division of responsibilities, compared to FBC-Circ. 06/6 and FINMA-Circ. 08/24, n 28-31. The expansion of provisions was primarily based on the adoption of requirements from the corresponding FAQ and the alignment with international standards.

2.2.2.2. Executive Management

178 In previous versions there were no explicit *requirements* regarding personal qualifications for the executive body, as there were for the board of directors.[561] The draft of the last revision proposed personnel requirements for the executive board in line with BankA 3 II c, in the sense that these individuals should enjoy a good reputation and guarantee irreproachable business conduct. Additionally, it suggested that the members, as a collective body, should possess sufficient experience in the banking and financial sector, integrity, and as individual leaders, sufficient leadership skills and the necessary expertise. In addition, the members of the executive management, through their personal conduct, should embody the corporate and risk culture of the institution (referred to as tone at the top).[562] These proposals were opposed with the argument that the requirements exceed the legal prerequisites of the guarantee of irreproachable business conduct and are impermissible. Others however suggested that the members of the executive management should also embody the corporate values through their personal behaviour and therefore saw room for the provisions to go further.[563] FINMA responded that it intended to provide more legal certainty with the draft as it formalised longstanding supervisory practices. Nevertheless, it consequently streamlined the requirements. The provisions regarding the role model function and the tone at the top were erased, as it considered them as not being enforceable from a supervisory perspective.[564] Today, the requirements for members of executive management are reduced to the necessity of demonstrating sufficient leadership and professional skills to ensure ongoing compliance with the licensing requirements in operational business operations.[565]

179 The executive board was already from early on assigned *responsibilities and tasks*, including the separation of functions and control activities, compliance in terms of adherence to norms, as well as in terms of function and risk control.[566] Compared to earlier versions of the Circular, responsibilities and tasks of executive management have over time been significantly reduced and adjusted. This is because the level of detail in these provisions was criticised dur-

561 Cf. FBC-Circ. 06/6, n 80-126; FINMA-Circ. 08/24, n 80-126.

562 FINMA, Erläuterungsbericht Entwurf FINMA-Circ. 16/xx 2016, 12 et seq.; FINMA, Entwurf FINMA-Circ. 16/xx, n 64.

563 FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 17 et seq., amongst the opponents was the Swiss Bankers Association.

564 FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 17 et seq.

565 FINMA-Circ. 17/1, n 51.

566 Cf. FBC-Circ. 06/6, n 80-126; FINMA-Circ. 08/24, n 80-126.

ing the last revision, which led to the current version of the Circular. FINMA followed suit, stating that the provisions in question could be reduced without a substantial loss of content.[567]

B. Authorisation as an Element of the Supervisory Law Life Cycle

1. Conceptual Definition

As previously noted, banking activities are subject to a licensing obligation. Consequently, a bank must demonstrate its compliance with a variety of requirements, *inter alia* regarding the organisational structure (BankA 3 II a) and key personnel (BankA 3 II c) in an authorisation process.[568] In accordance with the general setup of the Swiss financial market law, where individuals are generally not required to obtain a license in order to operate within the financial market, senior management of large banks are not dependent on an individual licensing obligation. Rather, requirements are installed through institutional mandates.[569] Given that both the organisational and the personal requirements placed upon the institution are licensing requirements, senior managers play an important role in the banks' approval process.[570] 180

Whether an institution fulfils these requirements is examined by FINMA in an authorisation process (cf. also BankA 3 II).[571] If the bank meets the requirements, the license is granted and the firm in question is authorised to conduct banking activities. This marks the beginning of the supervisory law life cycle.[572] The license holder thereby becomes subject to prudential supervision, as ad- 181

567 FINMA, Anhörungsbericht FINMA-Circ. 17/1 2016, 12 et seq.; cf. FINMA, Entwurf FINMA-Circ. 16/xx, n 53-63 and FINMA-Circ. 17/1, n 47-50, also in comparison to FBC-Circ. 06/6 and FINMA-Circ. 08/24, n 80-126, where already the reduced number of notes indicate a significant decrease of the tasks and responsibilities of the executive body (from 46 in the previous version to 10 in today's version).

568 NOBEL, § 7 n 143; KUNZ, § 3 n 554; STALDER, Bankgeschäft, n 249; LOMBARDINI, Chap. III, 1; see also n 147 et seq. of this thesis.

569 ZUFFEREY/CONTRATTO, 137.

570 BRAIDI, n 239; AELLEN, 213.

571 NOBEL, § 7 n 101; LOMBARDINI, Chap. III, n 1; STALDER, Bankgeschäft, n 249.

572 Cf. KUNZ, § 3 n 559, who states that the granting of the banking license marks the very beginning of the supervision. "Supervisory law life cycle" is not an established term in Swiss financial market law (see also n 8 of this thesis). However, BAUER, EF 2021, 608 refers to a cycle in the context of describing activities of FINMA and names authorisation, supervision, enforcement.

herence to these requirements constitutes a continuous obligation. Any changes affecting requirements during the lifespan of an institution must be reported to FINMA and may necessitate the issuance of a new license (cf. BankA 3 III, BankO 8a). This re-licensing process is generally presumed to follow a similar procedure as the initial licensing.[573] Instances of re-licensing hold greater relevance in the herein context compared to the one of obtaining a license for establishing a systemically important bank, as such cases are rare.[574]

2. Function and Objective

182 The licensing obligation and its authorisation aims to serve the protective supervisory objectives and hence seeks to safeguard depositors and the proper functioning of the financial market as whole (cf. FINMASA 4).[575] Being a part of public law, the Banking Act does not govern the relationship between the bank and its depositors, despite safeguarding depositors being a primary goal of the act. The fulfilment of supervisory objectives is not achieved through the regulation of specific business transactions but by subjecting banking activities to rigorous licensing requirements and continuous oversight by the state or its duly designated authority.[576] It is worth noting that the imposition of a mandatory license constitutes a significant interference with the constitutional right of economic freedom (FCSC 27), and hence restrictions are only permissible under the conditions of FCSC 36.[577]

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573 WINZELER, BSK BankA 3 n 2; STALDER, Bankgeschäft, n 249; NOBEL, § 7 n 169; BERTSCHINGER, Finanzmarktaufsicht, § 11 n 6; KUNZ, § 3 n 559 RHINOW/BAYERDÖRFER, 121. The continuous adherence is examined in the course of the ongoing supervision, see this thesis n 243 et seqq. and potential violations of these requirements can lead to an enforcement procedure, see n 308 et seqq. The assumption that the re-licensing process follows a similar procedure is based on the fact that there are generally no specific separate regulations or guidelines to prescribe a such re-licensing process, nor is there a distinct discussion in literature. An exception constitutes the changes of senior management, see n 290-293.

574 Pro memoria: As previously mentioned, as of January 2024, the following banks count as systemically important banks (SIBs): Credit Suisse, UBS, PostFinance, Raiffeisen and Zürcher Kantonalbank. Credit Suisse and UBS count as globally systemically important banks (G-SIBs), however Credit Suisse will be integrated into UBS following its acquisition in March 2023, see also n 29 of this thesis.

575 STALDER, Bankgeschäft, n 242; BERTSCHINGER, Finanzmarktaufsicht, § 11 n 2; ZULAUF, Finanzmarktenforcement, 20; see also n 157 of this thesis.

576 STALDER, Bankgeschäft, n 242.

577 BERTSCHINGER, Finanzmarktaufsicht, § 11 n 3; FCSC 27 encompasses any privately operated economic activity aimed at earning a profit. Restrictions are only permissible under the conditions set out in FCSC 36: Accordingly, any intervention in economic freedom requires a *legal basis*, must be based on a *public interest* or *the protection of the fundamental*

3. Requirements affecting Senior Management

3.1. Organisational Perspective

3.1.1. *Administrative Organisation and Separation of Governing Bodies*

Regarding the organisational requirements, BankA 3 II a is of particular relevance. It necessitates the banks' articles of association, partnership agreements, and set of regulations to establish an administrative organisation corresponding to its business activities and prescribe a functional and personnel separation of the governing bodies.[578] This division serves the purpose of mitigating the risks associated with the concentration of multiple functions in a single authority.[579] This dualistic organisational structure goes beyond the scope of company law and also constitutes a stricter approach to corporate governance.[580] It is seen as a central element of the licensing requirements.[581] 183

This functional and personnel separation is assured through the mandatory establishment of a board of directors (also: supervisory board) and an executive board (also: executive management). The powers between these separated bodies must be delineated to ensure proper oversight of management.[582] Members of the board of directors cannot belong to the executive board (BankO 11 II).[583] The board of directors is responsible for decision-making on strategy and overseeing the bank, while the executive board, which serves as 184

rights of third parties, and must be *proportionate*. Moreover, a requirement for permission must not undermine the core content of the fundamental right. With regards to the present context, FCSC 98, which authorises the Confederation to legislate the banking system, generally provides the constitutional basis for restrictions FCSC 27, cf. STALDER, Bankgeschäft, n 185 et seq.

578 KLEINER/SCHWOB, SK BankA 3 n 20, 193; NOBEL, § 7 n 149 et seq.

579 KRAMER/ZOBL, n 616; STÖCKLI, 87. While the separation is legally mandated only if necessary due to the purpose or scope of the business, in practice, it is generally expected and exceptions require approval from FINMA, see LOMBARDINI, Chap. IV n 12; WINZELER, BSK BankA 3, n 8; KLEINER/SCHWOB, SK BankA 3 n 61.

580 NOBEL, § 7 n 151; BAUER, EF 2021, 612; KUNZ, § 3 n 537 et seq.; BOVET/HÉRITIER LACHAT, Surveillance, n 24, 29, 35, cf. also CO 716, 716b. Furthermore, an effective functional separation between trading, asset management, and settlement is also required, see cited references for details.

581 KUNZ, § 3 n 558.

582 WINZELER, BSK BankA 3, n 8 et seq.; BOVET/HÉRITIER LACHAT, Surveillance, n 24.; cf. also the wording in BankA 3 II a.

583 NOBEL, § 7 n 151; see furthermore, BAUER, EF 2021, 612,

the operational management body, manages the bank's day-to-day operations.[584] The required codification of the administrative organisation of the bank should also include a clear assignment of tasks and competencies between the governing bodies, as well as delegation of powers to ensure clear delineation of responsibilities.[585] Thereby the Banking Act establishes the basic setup for the senior management of banks, most importantly by installing the board of directors and the executive management, both of which will be further elucidated in the following section.[586]

3.1.2. *Board of Directors*

3.1.2.1. Requirements

185 Regarding the board of directors of a bank it is required that it consists of a minimum of three members (cf. BankO 11 I) and that at least one-third of the board of directors are independent members.[587] Someone is considered independent if the person meets the following criteria: has not been employed in any other function within the institution, nor by the institution's audit firm as the lead auditor responsible for the regulatory audit in the previous two years; does not have any commercial relationships with the institution that could lead to conflicts of interest, considering the nature and scope of such relationships; and is neither a qualified participant of the bank (as defined in BankA 3 II c^{bis}), nor represents such a participant.[588] These independence criteria primarily have a formal nature.[589]

186 The board of directors, as a collective body, must possess sufficient leadership competencies, necessary expertise, and experience in the banking and financial sector. Additionally, it should be adequately diversified to competently represent not only the main business areas but also the central functions such as finance and accounting, and risk management.[590]

187 The appointment of the board of directors generally is at the owners' discretion. However, it is a prerequisite that the selected candidate provides for the

584 Lombardini, Chap. IV n 13.
585 Kleiner/Schwob, SK BankA 3 n 43-45, 193.
586 For a definition of senior management in the herein context see n 64-66 of this thesis.
587 FINMA-Circ. 17/1, n 17; FINMA may approve exceptions.
588 FINMA-Circ. 17/1, n 18-22; see n 23-25 for specific provisions regarding members of the board of directors of cantonal or communal banks.
589 Strasser, Finanzmarktaufsicht, § 17 n 33.
590 FINMA-Circ. 17/1, n 16.

guarantee of irreproachable business conduct according to BankA 3 II c, which will be examined by FINMA.[591]

3.1.2.2. Prescribed Responsibilities

Besides these requirements, FINMA-Circ. 17/1 lays out a minimum catalogue concerning the board of directors' tasks and responsibilities.[592] This body is attributed responsibility for the business strategy and risk policy, including the establishment and oversight of effective risk management, as well as the management of overall risks and must also issue guidelines on corporate culture.[593] The board of directors also bears the responsibility for ensuring adequate organisation and issuing the subsequent necessary rules and regulations.[594] With regards to finances, it assumes ultimate responsibility for the financial situation and development of the institution.[595] It exercises overall supervision and control over the executive board and is responsible for ensuring an appropriate risk and control environment within the institution. It monitors the internal audit, mandates the regulatory audit and assesses their reports.[596] Furthermore, it is responsible for finances, personnel, and other resources (such as IT infrastructure), and has decision-making powers concerning significant structural changes and investments. Additionally, it is authorised to appoint and remove the chief risk officer and appoint the head of internal audit, which is also subject to its oversight.[597] 188

3.1.2.3. Basic Principles Governing a Directorship

FINMA-Circ. 17/1 furthermore foresees the basic principles governing a directorship. Thereby, all members of the board of directors must devote sufficient time to their roles and play an active part in the strategic leadership of the bank.[598] The body must also define the profile requirements for its members, the chair, potential committee members, and the CEO. For other members of the executive management, such as the chief risk officer and the head of internal audit, the profile requirements must be periodically assessed and ap- 189

591 Strasser Finanzmarktaufsicht, § 17 n 34; regarding FINMA's assessment of an individual see n 192 et seqq. of this thesis.
592 Cf. FINMA-Circ. 17/1, n 9-15.
593 FINMA-Circ. 17/1, n 10.
594 FINMA-Circ. 17/1, n 11.
595 FINMA-Circ. 17/1, n 12.
596 FINMA-Circ. 17/1, n 14.
597 FINMA-Circ. 17/1, n 13, 15.
598 FINMA-Circ. 17/1, n 26.

proved, and succession planning ensured.[599] The board of directors is required to critically evaluate its own performance at least once a year, potentially with the involvement of third parties, and document the results.[600] It must also regulate conflicts of interest and hence it is mandatory to disclose previous and existing conflicts of interest, and take appropriate measures to effectively limit or eliminate unavoidable conflicts.[601] The Circular also outlines the role of the chair of the board of directors, who presides over the board and represents it internally and externally. This person plays a key role in shaping the bank's strategy, communications, and culture.[602] The chair of the board of directors is not allowed to be a member of the audit committee or chair the risk committee.[603]

3.1.3. *Executive Board*

3.1.3.1. Requirements

190 With regards to the executive board, as a collective body, as well as its members as functional executives, requirements regarding sufficient leadership skills, necessary expertise, and experience in the banking and financial sector are set forth. This ensures the appropriate fulfilment of authorisation requirements within the scope of operational activities.[604]

3.1.3.2. Prescribed Responsibilities

191 There are also responsibilities attributed to the executive management. This body is mainly responsible for the operational activities in accordance with the business strategy and the directives and decisions of the board of directors.[605] In addition to managing day-to-day operations, it must issue rules to govern operational activities and has to ensure the establishment and maintenance of adequate processes.[606]

599 FINMA-Circ. 17/1, n 27.
600 FINMA-Circ. 17/1, n 28.
601 FINMA-Circ. 17/1, n 29.
602 FINMA-Circ. 17/1, n 30.
603 FINMA-Circ. 17/1, n 33; see also n 33-46 for the detailed requirements on the setup and the prescribed responsibilities; SIBs are required to establish an audit and risk committee, as well as a compensation and nomination committee (at least at group level), see FINMA-Circ. 17/1, n 31.
604 FINMA-Circ. 17/1, n 51.
605 FINMA-Circ. 17/1, n 47.
606 FINMA-Circ. 17/1, n 48-50.

3.2. Personnel Perspective

3.2.1. *Guarantee for Irreproachable Business Conduct*

3.2.1.1. Outline of Concept

a. Definition

From a personnel perspective, in order to obtain authorisation to conduct banking business, BankA 3 II c requires that key personnel possesses a *good reputation* and provide a *guarantee of irreproachable business conduct* (hereinafter also: irreproachability guarantee or guarantee).[607] While this norm is considered a fundamental element of the banking and financial system, a legal definition for this terminology is not provided.[608] 192

As widely acknowledged today, the norm encompasses both a professional and moral component, imposing subsequent requirements on the management.[609] In summary, it is required that the individuals in question provide professional competence (also: fitness) and irreproachable conduct (also: propriety) in business activities.[610] While the professional requirements are easier to grasp, determining the content of the moral component is more challenging given its inherent indeterminacy and the subsequent room for interpretation.[611] It is generally recognised that the aspect of *good reputation* does not have an independent meaning but rather is seen as emphasising the moral component.[612] The element of *business conduct* is considered to encompasses any professional activity performed by individuals involved in the administration and management of a bank.[613] 193

607 Kuhn/Wyss, Finanzmarktenforcement, 365; Stalder, Bankgeschäft, n 249.

608 Bovet/Héritier Lachat, Surveillance, n 366.

609 Zulauf, FINMA Sonderbulletin 2013, 12; Baumgarten/Burckhardt/Roesch, AJP 2006, 170; Kleiner/Schwob, SK BankA 3 n 180; Kunz, § 3 n 170; FINMA, Wegleitung Organmutationen, 1 et seq.

610 See instead of many FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 3.1; FSC decision 2A.261/2004 from 27 May 2004 consid. 1; Bischof, n 181.

611 Baumgarten/Burckhardt/Roesch, AJP 2006, 169.

612 Aellen, 85; Kleiner/Schwob, SK BankA 3 n 180; Chatton, AJP 2011, 1194; Bovet/Héritier Lachat, Surveillance, n 387; Braidi, n 276; Kramer/Zobl, n 622; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3.

613 Aellen, 126.

194 The requirements in BankA 3 II c intend to serve a preventive purpose, as reflected in the term guarantee, rather than a repressive one.[614] From a preventive and positive perspective, the concept of the guarantee of irreproachable business conduct sets forth the regulatory requirements prescribed to individuals who want to take on and uphold a subsequent position.[615] In practice, however, the concept is highly relevant from a prospective and negative perspective. In fact, the discussions around the irreproachability guarantee are mostly from such a point of view.[616] From this perspective it examines behaviours and personal attributes that are not compatible with the guarantee of irreproachable business conduct, and hence potential misconduct by relevant individuals.[617] This part examines the concept from a positive perspective, while the negative perspective is elucidated in the fourth part of this thesis, analysing enforcement.[618] Thereby, a more comprehensive understanding of the irreproachability guarantee can only be gained after the analysis of its role in enforcement.

b. Indeterminacy

195 The irreproachability guarantee has been referred to as the "gateway into financial market regulation", "surprise bag", or "wild card" and considered the most famous and controversial provision in Swiss financial market law.[619] The origin of these creative terms and the ongoing criticism of the controversial provision lies in the fact that the irreproachability guarantee is undisputedly an indeterminate legal term (*unbestimmter Rechtsbegriff*) which requires inter-

614 FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.4.

615 Terminology influenced by AELLEN, 125 et seqq.

616 BankA 3 II c is frequently cited as a licensing criterion and it is then proceeded to explain and interpret this criteria from a negative perspective, see e.g. WINZELER, BSK BankA 3 n 16-22; NOBEL, § 7 n 172-193; KUNZ, § 3 n 170-174; RHINOW/BAYERDÖRFER, n 58-83, 142-151; BÜHLER, SJZ 2014, 29-34; BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 189 et seqq.; KLEINER/SCHWOB, SK BankA 3 184 et seqq. Others discuss it solely from an enforcement and hence negative perspective see e.g. UHLMANN, SZW 2011, 437 et seqq. (noting that it is also used as an authorisation procedure 438, 439); KUHN, Berufsverbot 66-69; GRAF, GesKR 2019, 379, 381, 384, 386; a combined perspective is identified in HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 2, 7, 9, 23-30; CHATTON, AJP 2011, 119 et seqq.; similar also the neural approach of BOVET/HÉRITIER LACHAT, Surveillance, n 368, 383-393. AELLEN examines it from positive and negative viewpoints, see 125 et seqq.; also BRAIDI, n 257 et seqq.; REISER, SZW 2022, 543; BISCHOF, n 180 et seqq.

617 AELLEN, 125.

618 See n 308 et seqq. of this thesis.

619 BISCHOF, n 1 with further references; ZULAUF, FINMA Sonderbulletin 2013, 15.

pretation by FINMA, as well as the courts, and affords subsequent discretion.[620]

In principle, the interpretation of the content and scope of requirements for irreproachability should be guided by the protective purposes of the Banking Act and other financial market laws, as inadequate bank managers can harm depositors and the banking system.[621] Addressees of the irreproachability guarantee must act in a manner that does not compromise the institution by damaging the trust placed in it by the public or the reputation of the financial market in general.[622] Still, this leaves a lot of room for interpretation and makes it difficult to allow for a conclusive determination of requirements or consequences given the high degree of interpretational ambiguity. Some even consider that because of the indeterminate formulation it is impossible for the norm addressees to draw the line between permissible and prohibited behaviour under the guarantee for irreproachable business conduct.[623] Others recognise that the wording to be formulated in such an open-ended manner that it is impossible to derive precise conclusions from it. As such, the formulation is not seen to establish a suitable standard for judging the legality of the supervisory authority's practices.[624] Consequently, this leads to controversies surrounding the actual content and extent of the requirements for affected persons, and especially whether the provision installs additional duties on the affected persons.[625] 196

620 Instead of many see e.g. BOVET/HÉRITIER LACHAT, Surveillance, n 383; AELLEN, 85, 123; KLEINER/SCHWOB, SK BankA 3 n 174; RHINOW/BAYERDÖRFER, n 35; BÜHLER, SJZ 2014, 29; KRAMER/ZOBL, n 622; CHATTON, AJP 2011, 1197; BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 170; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.1; FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 3.3. An *indeterminate legal term* exists when the legal provision describes the conditions for the legal consequence or the legal consequence itself in an open, indeterminate manner (cf. HÄFELIN/MÜLLER/UHLMANN, n 413). The *legal interpretation* aims to determine the meaning of a legal provision. It is necessary when the wording of the law is not clear or when there are doubts about whether an apparently clear wording reflects the true intent of the norm (cf. HÄFELIN/MÜLLER/UHLMANN, n 175-216). *Discretion* describes the decision-making authority of administrative authorities that the legislator grants them through openly formulated provisions (cf. HÄFELIN/MÜLLER/UHLMANN, n 390-449).

621 AELLEN, 91; KLEINER/SCHWOB, SK BankA 3 n 192; CHATTON, AJP 2011, 1198; RHINOW/BAYERDÖRFER, n 139; cf. FINMASA 4, regarding the objectives of the Banking Act see also n 157 of this thesis.

622 BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 171.

623 HABERBECK, Jusletter 2016, n 22.

624 RHINOW/BAYERDÖRFER, n 133; see also BISCHOF, n 800.

625 This will be discussed in context of the content of the norm, see n 192 et seqq., especially n 204 et seq. of this thesis.

197 Another controversial aspect observed by some is that the openness of BankA 3 II c has led to the instalment of legal provisions through it, which are subsequently seen as lacking a substantive legal basis.[626] In fact, the openness of the norm allowed for significant changes to financial market law to be implemented through it in the past.[627] For example, it served as a gateway to anchor the supervisory objective protection of the proper functioning of the financial market into supervisory law.[628] In addition, measures to combat money laundering were initially introduced through the guarantee provision before the Anti-Money Laundering Act (AMLA) was established. Similarly, it has been used to implement confiscation as an enforcement instrument (cf. FINMASA 35). The establishment of new supervisory practices through the guarantee provision and the subsequent stealthy legalisation is generally considered problematic.[629] It is not only seen as undermining legitimacy but also to potentially compromise the quality of the outcome, making it susceptible to errors and controversies.[630]

3.2.1.2. Personal Scope of Application

198 According to BankA 3 II c, "*persons entrusted with the administration and management of a bank*" must provide the irreproachability guarantee. This encompasses both the members of the supervisory board and those of the executive body, but it is not necessarily limited to them.[631] The qualification of so-called *irreproachable persons* is derived from the legal concept of the member of a governing body under civil law, as the legislator based the just-cited formulation in BankA 3 II c on company law.[632] Yet, with regards to banking law, additional individuals may also be considered irreproachable persons depending on the size of the bank, planned business activities, and the responsibilities of the individuals in question. Therefore, deciding who qualifies as an irreproach-

626 Baumgarten/Burckhardt/Roesch, AJP 2006, 170 et seq.; Kleiner/Schwob, SK BankA 3 n 96; Kramer/Zobl, n 622.

627 Winzeler, ZSR 2013, 440.

628 Winzeler, BSK BankA 3 n 25, with further references; see also FINMASA 4.

629 Winzeler, ZSR 2013, 443 et seq.; see also Bischof, n 181.

630 Winzeler, ZSR 2013, 440.

631 Winzeler, BSK BankA 3, n 16; Nobel, § 7 n 173; Kleiner/Schwob, SK BankA 3 n 175, see also n 9 for a detailed definition and task catalogue of both corporate bodies including references to company law.

632 Aellen, 114, who refers to the CC 54 et seq. (Swiss Civil Code). See also Hsu/Bahar/Flühmann, BSK FINMASA 33 n 24, who generally only see members of the supervisory and executive bodies (and qualified participants), as well as de facto bodies to fall within the scope of the irreproachability guarantee.

able person depends on the specific position this individual holds within the bank.[633] Consequently, is not possible to exhaustively list or specify individuals or groups qualifying as irreproachable person(s).[634] The qualification as an irreproachability guarantee position depends on the actual function and hierarchical level, rather than the title. Any person in a position of influence posing a risk to the bank should be considered as such.[635] Hence, the qualification as an irreproachable person for a bank employee with management responsibilities depends on assigned tasks and control mechanisms.[636] While in large or medium-sized banks, many influential positions may not be considered irreproachability positions, in a smaller institution, the same function may qualify as such. Generally, employees of a bank without or with limited leadership responsibilities do not qualify as irreproachable persons.[637]

With regards to the herein discussed senior management of SIBs, the guarantee of irreproachable business conduct definitely applies to the individuals who hold a position in the supervisory or executive board, however it is not limited to these positions only.[638] 199

3.2.1.3. Content

a. Professional Competence

The irreproachable persons of supervised institutions are required to possess the necessary professional qualifications to sufficiently guarantee irreproachable business conduct.[639] The individuals responsible for a bank must demonstrate relevant expertise and professional experience to be capable of conducting the bank's business knowledgeably and diligently.[640] This is also reflected in the requirements set forward with FINMA-Circ. 17/1. Whilst not explicitly referring to the irreproachability guarantee it sets forward that the board of directors, as a collective body, must possess sufficient leadership competencies, necessary expertise, and experience in the banking and finan- 200

633 BBl 1970 I 1151; Bovet/Héritier Lachat, Surveillance, n 377; Kuhn/Wyss, Finanzmarktenforcement, 365; Lombardini, Chap. V, n 63.

634 Rhinow/Bayerdörfer, n 54; BankA 3 II c.

635 Kleiner/Schwob, SK BankA 3 n 175; Aellen, 119, 121; Rhinow/Bayerdörfer, n 54; cf. also FAC decision B-3625/2014 from 15 October 2015 consid. 6.3.2.

636 Kleiner/Schwob, SK BankA 3 n 175.

637 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 25.

638 FAC decision B-3625/2014 from 15 October 2015 consid. 6.3.2.

639 Kuhn/Wyss, Finanzmarktenforcement, 365; Bühler, SJZ 2014, 29.

640 FCD 106 Ib 145 consid. 2.a; Branson, FINMA Corporate Governance 2015, 4.

cial sector. Similarly, regarding the executive management requirements regarding sufficient leadership skills, necessary expertise, and experience in the banking and financial sector are set forth.[641]

201 A rigid set of competencies or criteria that an individual must demonstrate does not exist within this context. Such qualifications are again seen as inherently contingent upon the specific institution and the particular position in question and hence are influenced by variables such as the bank's scale, the intended nature of its business activities, and the structure of its administrative organisation.[642] Moreover, the assessment extends beyond the capabilities of individual members, as it encompasses the collective competence of the entire governing body.[643]

b. Irreproachability

202 The requirement of the irreproachability guarantee entails not only the professional qualifications of the respective function holders but also certain moral prerequisites.[644] This *properness* must be fulfilled by each individual, unlike professional competence, which can be compensated for by another individual in the body.[645] The expectation for irreproachable persons is that they behave correctly, diligently, and honestly in their professional activities and enjoy a good reputation.[646] These individuals should not compromise their employer by damaging their reputation or the trust placed in them by the public, nor should they impair the reputation of the Swiss financial market.[647] The absence of significant conflicts of interest is sometimes seen as an additional required element.[648]

641 Cf. FINMA-Circ. 17/1, n 16 for the requirements regarding the board of directors; FINMA-Circ. 17/1, n 51 for the executive management.

642 BBl 1970 I 1151; KLEINER/SCHWOB, SK BankA 3 n 187; AELLEN, 127; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3; FSC decision 2A.261/2004 from 27 May 2004 consid. 1.

643 CHATTON, AJP 2011, 1201; BRANSON, FINMA Corporate Governance 2015, 4.

644 KUHN/WYSS, Finanzmarktenforcement, 365; BRANSON, FINMA Corporate Governance 2015, 4; BÜHLER, SJZ 2014, 29.

645 BRANSON, FINMA Corporate Governance 2015, 4.

646 KUHN/WYSS, Finanzmarktenforcement, 365; BRANSON, FINMA Corporate Governance 2015, 4; BÜHLER, SJZ 2014, 29.

647 BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 170.

648 NOBEL, § 7 n 172; BÜHLER, SJZ 2014, 29.

At the core of the irreproachability guarantee requirement is the conformity of individuals with the law.[649] According to long-standing court practice, this involves adhering to the legal framework, including banking and securities laws, as well as civil and criminal laws, observing the principles of good faith in business transactions, and complying with the internal rules of a bank. Therefore, the guarantee of irreproachable business conduct is incompatible with practices that violate relevant legal norms, internal regulations, codes of conduct, contractual agreements with customers, or duties of care and loyalty.[650] The Federal Administrative Court also held that the irreproachability guarantee entails integrity, probity, conscientiousness, uprightness, diligence and character strength.[651] Similarly, FINMA stated that it understands correct behaviour primarily as adherence to the legal framework, including laws, ordinances, the supervisory authority's provisions and practices, codes of conduct, and internal guidelines.[652] More generally it also stated that such individuals should behave in a manner that does not harm their own or the institution's reputation, or the trust placed in a bank by the public.[653] 203

3.2.1.4. Limits

As indicated previously, due to the indeterminacy of the provision the exact content and scope of the irreproachability guarantee is disputed. Its determination remains difficult and is also subsequent to ongoing practical development.[654] Some critically recognise an evolution of the guarantee provision which led to its ethical and political expansion.[655] Subsequent concerns have been raised as the practical application of the provision is seen to ultimately 204

649 BERTSCHINGER, Finanzmarktaufsicht, § 11 n 38.

650 Instead of many see e.g. FSC decision 2C_894 from 18 February 2016 consid. 6.4; FSC decision 2A.261/2004 from 27 May 2004 consid. 1; FAC decision B-1048/2018 from 19 May 2020 consid. 7.2; FAC decision B-2204/2011 (2012/33) from 24 July 2012 consid. 10.1; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3; FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 3.1. Cf. also KLEINER/SCHWOB, SK BankA 3 n 114 et seqq.; BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 170; BOVET/HÉRITIER LACHAT, Surveillance, n 385; BERTSCHINGER, Finanzmarktaufsicht, §11 n 38.

651 FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.3.

652 ZULAUF, FINMA Sonderbulletin 2013, 21, with reference to the ruling in FINMA, Bulletin 3/2012, 116-147, see specifically 122.

653 FINMA, Report UBS FX, 14; FINMA's predecessor authority also already followed this approach, see HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 15.

654 Cf. n 195-197 of this thesis.

655 BÜHLER, SJZ 2014, 29; BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 170; GRAF, AJP 2014, 1200; KUNZ, § 12 n 49, § 3 n 555; KRAMER/ZOBL, n 622.

create behavioural norms which lack legality.[656] Accordingly, BankA 3 II c does not constitute a sufficient basis to establish a separate moral code solely applicable to bank employees, nor to create a distinct definition of legality and morality against which the integrity of bank management should be measured.[657] Others see the guarantee of irreproachable business conduct as a specific duty of care under banking law. Consequently, its scope and breadth consequently are to be determined primarily based on legal and moral standards and banking practices.[658] Another perspective follows the view that since the Banking Act does itself not include (further) specific obligations or guidelines concerning the behaviour or duties of members of corporate bodies, the irreproachability guarantee encompasses the general duties from company law.[659]

205 It is followed that some identify an unwritten behavioural guideline from the guarantee of irreproachable conduct, abstracted from the practical application of the provision, which is sometimes considered as too far-reaching. It is worth noting that in broader exploration of financial market law in general, there exist conduct guidelines. Such however mostly address banks but still can have impact on individuals. Examples constitute guidelines regarding the prevention of money laundering which include statutory provisions (in the Criminal Code and Anti Money Laundering Act) and also self-regulatory standards from the Swiss Bankers Association (e.g. the Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence) or provisions from rules in the Financial Services Act.[660] However, these primarily focus on customer interactions and are thereby predominantly relevant to client-facing employees at a lower hierarchical level and of less relevance to members of governing bodies in the context of their leadership roles.

656 WINZELER, BSK BankA 3 n 25, with reference to RHINOW/BAYERDÖRFER, n 123; KLEINER/SCHWOB, SK BankA 3 n 174.

657 KLEINER/SCHWOB, SK BankA 3 n 191.

658 AELLEN, 190.

659 See BRAIDI, n 325 et seqq., 470 et seqq., 601 et seqq.; BISCHOF n 636 et seqq.; similarly, also cf. BERTSCHINGER, SZW 2020, 746. For members of the corporate bodies especially the following duties are of relevance: CO 717 (duty of care and loyalty), CO 717a (conflicts of interest); as well as depending on the setup CO 398 (faithful performance of the mandated person), CO 321a (duty of care and loyalty of the employee).

660 NOBEL, § 1 n 192-195.

3.2.2. *Place of Residence*

Apart from the irreproachability guarantee it is also required that the persons entrusted with the management of the bank have their place of residence where the exercise of the management can actually and responsibly be exercised (BankA 3 II d). More specifically, the bank must be effectively managed from Switzerland (BankO 10). These requirements for minimum presence are aimed at ensuring a connection to the supervisory authority and also ensuring the presence of responsible individuals to hold them accountable if needed.[661] 206

4. Senior Management in the Authorisation Process

4.1. Outline of the Process

Following the previous elaborations on the licensing requirements, it herein follows a presentation of how these are assessed in the course of an authorisation process. After a license application is submitted by the applying institution, FINMA examines the corresponding documents to assess whether the requirements are met. The authority has the duty to examine the facts *ex officio*.[662] In reviewing such applications, the supervisory authority must adhere to the usual principles of administrative procedure.[663] The Banking Act and the Banking Ordinance set forth various documents which must be submitted as part of the licensing process.[664] In addition, FINMA has developed corresponding guidelines that specify the information to be included and documents to be attached to a license application.[665] The supervisory authority may request additional documents from the applicant, who is obligated to cooperate.[666] 207

During the authorisation process of banks (and other supervised financial service providers), FINMA also relies on the examination of the licensing requirements by audit firms.[667] The appointed audit firm is solely responsible for con- 208

661 Winzeler, BSK BankA 3, n 33; Nobel, § 7 n 166.

662 Kleiner/Schwob, SK BankA 3 n 13.

663 Lombardini, Chap. III, n 2.

664 Bovet/Héritier Lachat, Surveillance, n 90.

665 Lombardini, Chap. III, n 3.

666 Kleiner/Schwob, SK BankA 3 n 15.

667 Bertschinger, Finanzmarktaufsicht, § 11 n 48, the author also notes that in order to strengthen the independency of this audit firm, a cooling off period is foreseen, according to which the audit firm is not allowed to take on a mandate for a regulatory audit, a financial audit or as an internal audit function from the institution for three after the li-

ducting the examination in the licensing process. The authority sets minimum standards for confirmations, the content of the examination and provides instructions and standardised documents to audit firms in their evaluation.[668] The audit report of the licensing auditor must clearly indicate compliance with regulatory provisions concerning all aspects related to the license application.[669]

4.2. Organisational Requirements

209 With regard to the organisational requirements, BankA 3 III serves as the starting point. It obliges the applicant to submit the articles of association, partnership agreements, and internal rules to FINMA.[670] Duties and responsibilities of the board of directors and executive management are delineated through internal frameworks and responsibility specifications.[671] More generally, the audit report assesses, among other things, the adequacy of the planned internal organisation and control, risk management, as well as internal guidelines such as statutes, directives, and regulations.[672] In particular, it must be confirmed that these are compliant with the law and that the internal organisation, infrastructure, and internal regulations are suitable for the intended business activities.[673] Furthermore, corporate governance, including the separation of board of directors and executive management, must be examined.[674]

210 In addition, FINMA specifies that more detailed information regarding the organisation must be provided.[675] As attachments, organisational documents and drafts of the internal framework are required. Moreover, a detailed organisational chart of the institution, including departments, personnel, responsibili-

cense is granted. Regarding the role of audit firms in the course of ongoing supervision, see n 260 et seqq. of this thesis.

668 FINMA, Wegleitung Bewilligungsprüfbericht, 1.

669 Bertschinger, Finanzmarktaufsicht, § 11 n 49; FINMA, Wegleitung Bewilligungsprüfbericht, 1.

670 Kleiner/Schwob, SK BankA 3 n 17.

671 Reiser, SZW 2022, 554.

672 Bertschinger, Finanzmarktaufsicht, § 11 n 49. Moreover, the formal completeness and consistency of the authorisation application, as well as compliance with the regulations regarding equity capital and liquidity, risk diversification, and depositor protection are also examined, see the cited source for details.

673 FINMA, Mindestgliederung Prüfbericht, no. 3.

674 FINMA, Mindestgliederung Prüfbericht, no. 3.1.

675 FINMA, Formular Neubewilligung Banken, 5.

ties, reporting lines, and staff percentages, must be submitted.[676] In the course of the authorisation procedure, FINMA (*inter alia*) reviews these internal frameworks. Responsibility specifications are not standardised by FINMA and they are only reviewed in specific cases when there exists a specific reason to do so. While a certain practice has developed for the examination of internal frameworks, supervisory law does not provide guidelines for the responsibilities of irreproachability guarantee holders beyond those prescribed for the respective corporate form.[677]

4.3. Personnel Requirements

4.3.1. *Documents and Information to be Submitted*

The information which must be submitted to assess the personnel requirement of the banking license (BankA 3 II c), and therefore the future senior management of a bank, is specified in the Banking Ordinance.[678] Accordingly, the following information and documents are *especially* required for these individuals: nationality, residence, qualified participations in other companies, pending judicial and administrative proceedings; a curriculum vitae signed by the respective person; references; and a criminal record extract.[679] Additionally, the institution is required to provide FINMA with a detailed profile of the qualifications needed for the open position and an overview of the entire committee. This submission should also include a comprehensive explanation of the selection process and an evaluation detailing the reasons why the institution considers the candidate to be a good fit for the role.[680] 211

The authority itself states that it may use all available information within FINMA concerning a person when assessing the professional competence.[681] In addition, the documents needed with regards to this requirement are further specified by the supervisory authority. For example, it must be communicated whether the person in question currently holds a position of responsibility and confirmed that no relevant legal, debt enforcement, or bankruptcy proceedings are pending, either domestically or abroad, that could affect the 212

676 FINMA, Formular Neubewilligung Banken, 7.

677 Reiser, SZW 2022, 554.

678 Winzeler, BSK BankA 3 n 1; Bovet/Héritier Lachat, Surveillance, n 91.

679 cf. BankO 8 I.

680 Reiser, SZW 2022, 553, with reference to FINMA, Wegleitung Organmutationen, 4. See also n 189 of this thesis for the subsequent requirement of the board of directors to create such profiles.

681 FINMA, Wegleitung Organmutationen, 2 et seq.

guarantee for irreproachable business conduct.[682] Additionally, the following documents are requested as attachments: an excerpt from the debt enforcement register; candidate profile (as previously noted); signed declaration regarding qualified participations and other mandates; and current and future organisational charts.[683] Multiple references are required as well.[684]

213 Regarding the board of directors, information is requested about the composition, including the designation of the chair, vice chair, and members of any board committees.[685] Information is also needed regarding whether these persons are active in daily business operations and independent, as well as whether and in which committees they participate.[686] Apart from the last aspect, similar information is requested for executive management: information regarding the composition, including who assumes the role of CEO, as well as additional information about the organisation and authorities. Additionally, the curriculum vitae needs to be supplemented with various details (such as a chronological and complete record of past activities and reasons for changing positions), as well as information about the location from which the executive management is actually carried out.[687]

4.3.2. *Assessment of the Guarantee of Irreproachable Business Conduct*

4.3.2.1. General Approach

214 When examining the personnel requirements during the approval process and the initial assessment of relevant individuals, the main focus of FINMA (besides the fulfilment of formal requirements of the institution) lies on the curriculum vitae, criminal record extract, and professional qualifications of senior management.[688] Furthermore, data regarding the individual in question, which FINMA has already processed and stored in its database, can be relevant to the

682 FINMA, Formular Gewähr, 2-4.
683 FINMA, Formular Gewähr, 7.
684 FINMA, Formular Gewähr, 3 et seq.
685 FINMA, Formular Gewähr, 2 et seq.
686 FINMA, Formular Gewähr, 2. Accordingly, individuals are not considered independent if they have a former or current employment relationship with the company or another company within the group, former employees of the company's audit firm, or individuals with other relationships that could lead to conflicts of interest, see cited source.
687 FINMA, Formular Gewähr, 2 et seq.
688 Chatton, AJP 2011, 1206.

assessment.[689] FINMA examines the professional competence (fitness) and the moral component (properness) of individuals before they assume a new role.[690]

Regarding the professional competence, the selection processes and explanations provided by the respective bank form the basis of FINMA's assessment.[691] The profiles defined by the supervisory board of its members, its president, potential committee members, as well as the CEO establish the foundation for the requisite qualifications of the respective position. Additionally, FINMA checks the qualification profile for the vacant position and the entire board, along with explanations of the selection process, including its assessment criteria determining the suitability of the candidate for the position, which must be submitted by the bank.[692] 215

Regarding properness FINMA emphasises that it independently conducts detailed investigations, without further commenting on how exactly this is assessed.[693] It is also common for the chair of the board of directors and the CEO, possibly accompanied by other key executives, to meet with FINMA.[694] This personal exchange between the individuals in question and FINMA, along with documented questions, helps draw conclusions about competence, reliability, and practical skills of the individuals.[695] Other members of senior management are primarily assessed based on their resumes, testimonials, and confirmations of their qualifications submitted by auditing firms. In-depth investigations are only conducted when there are indications of issues with the irreproachability guarantee.[696] 216

4.3.2.2. Past-oriented

The initial assessment to determine whether a person provides a guarantee for irreproachable business conduct is primarily based on the past.[697] The individ- 217

689 See n 266 et seqq. herein for a detailed discussion of this aspect.

690 FINMA, Wegleitung Organmutationen, 1 et seq. Thereby the assessment of the irreproachability guarantee in this context constitutes a positive scenario, see n 194 of this thesis.

691 FINMA, Wegleitung Organmutationen, 2.

692 Reiser, SZW 2022, 554 with references to FINMA-Circ. 17/1, n 27; FINMA Wegleitung Organmutationen, 4.

693 FINMA, Wegleitung Organmutationen, 2.

694 Emmenegger, Prudentielle Corporate Governance, 38.

695 Chatton, AJP 2011, 1206.

696 Emmenegger, Prudentielle Corporate Governance, 39; see also Reiser, SZW 2022, 550 who notes that currently only members of the corporate body are systematically evaluated by FINMA, further key persons only in exceptional cases.

697 Aellen, 214; FINMA, Wegleitung Organmutationen, 1 et seq.

ual in question is evaluated based on previous behaviour in relation to future conduct in a specific role.[698] For example, the irreproachability guarantee may be negatively assessed if the candidate has previously exhibited relevant misconduct that has not been rectified through subsequent good behaviour.[699] Prior positions held by the person in question can be relevant to the assessment. For instance, if an individual left the previous role under questionable circumstances, the factors leading to the termination must be considered. If misconduct is discovered, it needs to be evaluated in terms of its relevance to the new engagement, the conduct demonstrated by the person in question, and the timeframe since the occurrence of the misconduct.[700] Mere possibility of future misconduct is however not sufficient; past behaviour needs to be of a certain seriousness and indicate that further misconduct in the future is likely.[701] FINMA needs solid evidence against the irreproachability of the person in question for the specific intended role in case of a negative assessment.[702] If no relevant past violations are found based on the submitted records and documents, then the guarantee for irreproachable business conduct is affirmed.[703]

4.3.2.3. Specific

218 The assessment of an individual's irreproachability guarantee is generally not examined and confirmed in an abstract manner but only in specific cases. For instance, when applying for a banking license, the assessment of relevant individuals for the respective position is based on the specific position and the specific responsibilities associated with it. Therefore, FINMA never determines the irreproachability of a person in a general manner detached from a specific role. Relevant is not only the scope and nature of the function in question but also the size and structure of the concerned bank. This means that the individual must either be applying for such a specific function, or, in the case of an irreproachability procedure (in the negative sense), already hold such a function in order for the irreproachability to be assessed.[704]

698 KLEINER/SCHWOB, SK BankA 3 n 181.

699 REISER, SZW 2022, 549.

700 FSC decision 2A.261/2004 from 27 May 2004 consid. 1.

701 KLEINER/SCHWOB, SK BankA 3 n 181.

702 REISER, SZW 2022, 549, with further references; see also AELLEN, 214, who describes a similar practice of the FBC (predecessor authority of FINMA).

703 AELLEN, 214.

704 STALDER, Bankgeschäft, n 251; KUHN/WYSS, Finanzmarktenforcement, 366; FAC decision B-1360/2009 from 11 May 2010 consid. 3.2.2, 3.3.1; FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 2.2.

4.4. Authorisation and Legal Effect

The authorisation is granted based on the submitted application to the supervised entity.[705] The decision of FINMA regarding the issuance of a license is communicated through an appealable administrative decision.[706] The banking license is a classic regulatory permit (*Polizeibewilligung*). If the requirements are fulfilled, the applicant is entitled for the license to be issued.[707] When the administrative authority decides on the issuance or denial of a permit, it has to adhere to the principle of legality. Consequently, it generally has no discretionary power regarding the granting or denial of a permit when the conditions are fulfilled.[708] However, licensing obligations in financial market law often contain indeterminate legal terms, such as the guarantee for irreproachable business conduct. These terms necessitate interpretation and specification by FINMA and inevitably give the authority a certain degree of discretion in evaluating the application.[709] 219

With regards to senior management individuals, if the supervisory authority positively assesses the person, it means that the authority has no objections to the candidate's nomination as a member of the corporate body. It can, however, formulate conditions or requirements, such as initiating potential improvements in the expertise, experience or independence of the overall body. If, however, FINMA does not unconditionally follow a proposed senior management nomination by the bank, it consults with the institution beforehand. A ruling (*Verfügung*, according to APA 5) is only rendered in the event of a negative decision and if the bank disagrees with the authority's findings.[710] The institutions should not announce a nomination without the corresponding positive feedback from FINMA as it carries reputational risks for the institution as well as the affected individual. Should the assessment of the irreproachability 220

705 Lombardini, Chap. III, n 2.

706 Kramer/Zobl, n 608.

707 Nobel, § 7 n 146; Bovet/Héritier Lachat, Surveillance, n 18; Kleiner/Schwob, SK BankA 3 n 6; Winzeler, BSK BankA 3 n 1; Kunz, § 3 n 552; Bertschinger, Finanzmarktaufsicht, § 11 n 25; Lombardini, Chap. III n 1; cf. also FAC decision B-3625/2014 from 6 October 2015 consid. 6.3.1. Regarding the regulatory permit in general see also Häfelin/Müller/Uhlmann, n 2650 et seqq., especially n 2661.

708 Braidi, n 145 with further references. The principle of legality, as a tenet of general administrative law, stipulates that all administrative actions are bound by law. The law, therefore, serves as both the standard and limit for administrative activities. For a comprehensive discussion of the principle, see Häfelin/Müller/Uhlmann, n 325 et seqq.

709 Braidi, n 146 et seq.

710 Bauer, EF 2021, 611 et seq.

guarantee of an individual lead to a negative outcome, this can constitute a violation of the licensing requirements. Consequently, FINMA would intervene against the exercise of the irreproachability guarantee position.[711]

221 The "certificate" for the required guarantee of irreproachable business conduct of individuals is issued to the bank itself as it is a licensing requirement for the institution. Thus, it does not constitute a professional license for the individual in a senior management position.[712] Yet, by imposing conditions on certain individuals in the course of the institutional licensing, the legislator nevertheless shows its intention to involve individuals in the process. By doing so, the supervisory authority can monitor individuals without introducing a license for those persons. This is an atypical approach. Compared to other scenarios, where supervisory authorities monitor a certain activity and ensure the quality of integrity of the members (e.g. auditors, doctors, lawyers) by granting individual licenses, admissions, or requiring recognitions or registrations, in the case of senior management of banks, this journey ends halfway. The current setup imposes obligations on individuals but does not grant them personal authorisation, creating a dichotomy.[713] Generally individuals must not a obtain a license or be registered in order to operate within the financial market. However, there are certain exceptions, such as for example lead auditors (AOA 9a II), client advisors of financial service providers (FinSA 28-34), insurance intermediaries (ISA 41-45), or valuation experts (CISA 64).[714]

711 Reiser, SZW 2022, 548, who elaborates that according to BankA 49 banks can be fined up to CHF 500'000.

712 Aellen, 113 et seq.

713 Braidi, n 314.

714 Zufferey/Contratto, 137; Braidi, n 216-237.

II. Results

The supervisory law life cycle commences with the *authorisation* of the institution. In order to obtain a license, banks must demonstrate compliance with a variety of *requirements*, such as regarding the organisational structure (BankA 3 II a) or key personnel (BankA 3 II c). This phase thereby lays the fundament for the ensuing ones, given that the requirements have to be continuously adhered to. In the following section, the results of the preceding in depth-analysis are presented. Consequently, it covers the prerequisites regarding bank senior management, examined in their historical context and their reciprocal influence with prudential corporate governance, as well as the subsequent authorisation process. 222

Through the examination of the *historical context of the legal foundations* it became clear that mismanagement of high-ranking managers has been discerned as a principal factor contributing to numerous crises in the banking sector. Consequently, senior management of banks has played a central role in the initial legislative discussions of the Banking Act, dating back to the preliminary draft as far as 1910 and observable especially until the Act's first reform in the 1970s. However, despite the acknowledgment of senior managements' role in bank failures and crises, the analysis also showed that there has been a strong opposing force which, often times successfully, fought the instalment of (more stringent) requirements regarding key personnel. This is evident in the legislative process of the Banking Act, starting with its preliminary draft, as well as the evolutions leading to today's version of FINMA-Circ. 17/1 "Corporate Governance – Banks". In revisions of the latter, the supervisory authority, for example, attempted to include conduct or behavioural aspects, which were then not installed after objections from the industry. Similarly, opposition led to the Circular not explicitly addressing the concerns of depositors, despite the prioritisation of the depositors' interest as one of the key attributes of the BCBS guidelines on bank corporate governance. In addition, initially a personal liability norm for bank managers was introduced with the establishment of the Banking Act. This aimed to ensure accountability and impose a stricter liability as foreseen in company law. However, in the 2000s, it was deemed unnecessary to treat members of the corporate bodies of banks differently. Consequently, the Banking Act now solely refers to liability provisions in the Code of Obligations. Thereby it is concluded that while bank management, or more specifically their misbehaviour, has historically played an important role in the 223

establishment and development of the Banking Act and the accompanying provisions, installing rules on these individiduals has also faced strong opposition.

224 The analysis of the historical context also illustrated the *background and roots of today's setup*. As a preliminary regulatory approach the first Banking Act from 1935 sought to ensure proper management of banks by imposing organisational requirements. As a next step, in the course of a subsequent revision of the Banking Act in the 1970s, a licensing obligation was implemented, which not only incorporated the pre-existing organisational requirements but also introduced personnel requirements for the banks to fulfil in order to be allowed to conduct business. The formulation of the organisational requirements in BankA 3 II a has virtually remained the same since its instalment in 1935. The same holds true for the irreproachability guarantee provision (cf. BankA 3 II c), which was established as the key personnel requirement in 1975. Hence, as the framework regarding regulation of senior management in banks consists of both organisational and personnel requirements, a *dual-perspective strategy* for regulating these individuals was identified, which is historically rooted. Given this dual-perspective strategy, the senior management of banks plays a role in two out of the three licensing requirements of banks, the remaining prerequisites being regarding capital and liquidity.

225 Today, the *organisational requirements* of the bank license exert indirect influence on senior management. With BankA 3 II a, an organisational setup of the bank is established which pertains to corporate bodies, and in particular emphasises the functional and personnel separation of these through the establishment of a board of directors and an executive board. The board of directors is responsible for decision-making on strategy and overseeing the bank, while the executive board, serving as the operational management body, manages the bank's day-to-day operations. Additionally, FINMA-Circ. 17/1 further elaborates this organisational setup and allocates tasks and responsibilities to the bodies in a general manner as well as specifically to individual members. While not explicitly attributing corporate governance as a responsibility to the supervisory board, this body is (*inter alia*) considered responsible for the organisation of the bank, its strategy, for issuing internal regulations and an appropriate risk and control environment. Executive management, on the other hand, is considered responsible for developing and maintaining effective internal processes and issuing rules regulating business operations. Consequently, the setup of a bank's senior management is highly influenced by cor-

porate governance, and vice versa. In addition, tasks and responsibilities deriving from the implementation of the framework are assigned to the corporate bodies.

As the banking license also sets forth *personnel requirements*, the analysis found BankA 3 II c to constitute the second element of the dual-perspective strategy to regulate senior management in banks. From this perspective, the persona of the senior manager is addressed and it is required that the individuals in question "*enjoy a good reputation and provide a guarantee of irreproachable business conduct*" (so-called irreproachability guarantee, cf. BankA 3 II c). With regard to the provisions' personal scope of application, the analysis showed that the irreproachability guarantee unquestionably pertains to members of corporate bodies, hence the supervisory board and the executive management, as addressees, but potentially also to lower hierarchical levels, depending on the bank's size. In terms of content the norm essentially contains the professional competence (also: fitness) as well as an individual's irreproachability (also: propriety). Both elements are to be assessed respective to the position in question and in the context of the bank's size and setup. While there seems general consensus on what professional competence should encompass, the content of the irreproachability remains difficult to grasp and disputed. In reviewing the practice of FINMA and the courts, it became clear that at the core of the irreproachability lies adherence to the law and standards. Besides the irreproachability guarantee it is also mandated that persons entrusted with the management of a bank must reside in a location enabling them to effectively and responsibly manage the institution, and thereby ultimately must be located in Switzerland. This should ensure their accessibility by the supervisory authority and subsequently also their accountability (cf. BankA 3 II d, BankO 10). 226

A high level of *indeterminacy* and the ensuing complexity are characteristic for the irreproachability guarantee. This has triggered debates, especially around questions of moral or ethics. Compared to other licensing prerequisites, the irreproachability guarantee is the least detailed with minimal accompanying provisions. While this norm constitutes one of the legal bases of FINMA-Circ. 17/1, the provisions in this regard basically only refer to the aspect of professional competence and in summary requires senior management to possess sufficient leadership skills and the necessary expertise and experience in the banking sector. Currently, no further documentation or guidance for the expected capacity and conduct of senior bank management were identified. Instead of written rules, the indeterminate legal concept of the irreproachability guarantee gets contoured by the practice of FINMA in the norm's application. 227

This is primarily done by its evaluation of whether an individual violated the provision with a certain behaviour. This primary discussion from a negativist view of this licensing requirement is also prevalent in the academic discourse. Consequently, for the purpose of the herein analysis, a clearer view on the concept of the irreproachability guarantee can presumably only be gained after an examination of its role in enforcement, and not solely from the authorisation phase of the supervisory law life cycle. Thereby it is concluded that the irreproachability guarantee, as the key personnel requirement, is undisputedly an indeterminate legal term and the exact scope and content cannot be conclusively determined. Given the dominating negativist view on this requirement, a more comprehensive understanding might be gained after an examination of the enforcement phase.

228 Based on the available material, the analysis found the *authorisation procedure* to largely rely on document-based evaluation. Respective guidance for banks from the supervisory authority is mainly limited to prescribing which documents must be submitted in the course of a licensing process. It was also revealed that the supervisory authority relies on the examination of the licensing requirements by audit firms. For these, FINMA sets minimum standards for confirmations, the content of the examination and provides instructions and standardised documents to audit firms in their evaluation. Generally, with regards to the authorisation procedure, the analysis was unable to identify a general academic discourse on this topic. Therefore, gaining a conclusive comprehension of the exact procedure proved challenging. In one of the few discussions identified regarding this topic it has however been questioned whether the current setup of the initial assessment of the irreproachability guarantee is really able to prevent unsuitable persons from taking on such positions. Moreover, the analysis revealed that while the licensing requirements potentially significantly impact senior managers, the banking license (as a positive outcome of the authorisation process) is issued to the applying institution and not to the senior managers. Imposing requirements on natural persons but abstaining from a formal licensing or registration procedure is generally found to be an atypical approach for an authority seeking to monitor a certain group of individuals. The analysis concludes that the authorisation procedure mostly relies on document-based evaluation. Whilst the bank license requirements impact the individuals of senior management, the license is solely issued to the institution.

229 Thereby, the preceding analysis of the requirements and the authorisation process was able to identify the regulatory framework of senior management, deriving from both organisational and personnel licensing requirements of

banks. This was defined as a dual-perspective strategy. Consequently, its setup is heavily influenced by corporate governance provisions. While not explicitly setting forth a responsibility for corporate governance in general, some tasks and responsibilities deriving from such are attributed to the corporate bodies. To some extent, this indicates at least a limited theoretical reciprocity of prudential corporate governance and senior management.

III. Emerging Approaches

A. United Kingdom

1. Authorisation

1.1. Senior Management Functions

230 With regard to the emerging approaches, the entry barrier for specific categories of individuals constitutes an integral element of the Senior Managers and Certification Regime (SM&CR) in the UK. The most stringent threshold is applied to the highest-ranking individuals.[715] These so-called "Senior Management Functions" (SMFs) are predetermined by regulatory authorities, emphasising their significance in ensuring the safety, soundness, and promoting good conduct.[716] Such SMFs are defined by two main criteria. First, the relevant person will be managing one or more aspects of the affairs of a supervised entity (e.g. bank). Second, the activities of the relevant person must involve a risk of serious consequences for the authorised financial institution or for business interests in the UK.[717] SMFs encompass both executive roles (e.g. CEO, CFO, CRO, head of internal audit, head of key business area) and specific non-executive positions (termed oversight SMFs, including board chair, committee chairpersons, and senior independent directors).[718] Further, non-executive directors are recognised as holding a senior management function if they undertake responsibilities of such a role.[719] Thereby, non-executive directors who are not chairing a board committee are not automatically categorised as senior management but can be if they assume particular responsibilities.[720]

231 Individuals intending to take on a senior management function must be fit and proper in order to be authorised to assume their role. Whether they are considered as such is primarily evaluated by the banks, while their assessment is

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715 For an overview on the UK setup and the rationale of the approach see n 105-114 herein.

716 Allen, BoE Bulletin Q3 2018, 3.

717 Kokkinis/Miglionico, 241; FSMA 2000 s 59ZA.

718 Kokkinis/Miglionico, 242; PRA, Rulebook CRR Firms, Senior Management Functions, n 3-5.

719 Allen, BoE Bulletin Q3 2018, 3.

720 Kokkinis/Miglionico, 242.

directed by the extensive guidance of the authorities.[721] For example, it is set forth what qualifications, training, competence and personal characteristics must be considered in the assessment.[722] The Prudential Regulation Authority (PRA) and/or Financial Conduct Authority (FCA) must then approve the firm's assessment, in order for an individual to assume her senior management function.[723]

An important aspect of the assessment procedure are the *regulatory references*.[724] These constitute employment references, obtained by the hiring bank from the candidate's previous employers, with its form and scope prescribed by the authorities.[725] Such must be obtained for senior manager functions (as well as roles under the certification regime and non-executive directors), from all the person's current and former employers in the previous six years.[726] In obtaining the reference, the bank is obligated to use the template provided by the authorities.[727] *Inter alia*, it is required to present information relevant to the hiring bank's assessment of the candidate's fitness and propriety, including details of any internal disciplinary action by the firm against the individual in the previous six years.[728] With such a system, individual accountability should not be undermined by persons who can gain employment at another firm without disclosing previous misconduct, which therefore prevents the recycling of individuals with poor conduct records between firms.[729] In serving this purpose, the UK's measure was promoted as a best practice by the Financial Stability Board (FSB).[730] 232

Moreover, this initial authorisation process also includes *identifying and assigning responsibilities* to senior managers and submitting the respective documentation to the authorities. A "Statement of Responsibilities" (SoR) is required which details the particular aspects that the candidate is intended to be 233

721 Allen, BoE Bulletin Q3 2018, 2; Hickman, Mod. Law Rev. 2022, 10; Chiu/Wilson, 518; Emmenegger, AJP 2022, 823; FSMA 2000 s 60A(2)(a)-(d). Regarding the guidance provided by the authorities see e.g. PRA, Rulebook CRR Firms, Fitness and Propriety.

722 Kokkinis/Miglionico, 242; for the fitness and propriety requirement see FSMA 2000 s 61A, for the elements to be considered in the evaluation see FSMA 2000 s 60A.

723 Hickman, Mod. Law Rev. 2022, 10; FSMA 2000 s 60A.

724 Emmenegger, AJP 2022, 823; FSMA 2000 s 64C; PRA, Rulebook CRR Firms, Fitness and Propriety, n 5.

725 PRA, SS28/15, n 6.1.

726 PRA, SS28/15, n 6.4.

727 PRA, SS28/15, n 6.26; PRA, Rulebook CRR Firms, Fitness and Propriety, 5.3.

728 PRA, SS28/15, n 6.25, 6.31, 6.34.

729 Allen, BoE Bulletin Q3 2018, 6; PRA, SS28/15, n 6.2.

730 See FSB, Toolkit 2018, 61; for the rolling bad apples phenomenon see n 91 of this thesis.

responsible for. This has to be submitted with the approval application to the authorities.[731] To a certain degree, these responsibilities are prescribed.[732] Regulators define a set of "Prescribed Responsibilities", which necessarily must be allocated to a SMF and included in that person's statement of responsibilities. These encompass, for example, responsibilities in direct connection to compliance with the provision of the SM&CR, but also responsibility for the firm's capital, funding and liquidity.[733] Thereby, every SMF is attributed a responsibility which is inherent and inseparable from the function, built into the specific role and considered the most important responsibility of the respective function.[734] As examples, for the SMF "Chair of the Governing Body" has the "[...] *responsibility for chairing, and overseeing the performance of the role of, the governing body of a firm.*".[735] Furthermore, the "Chief Executive Function", is attributed the "[...] *responsibility, under the immediate authority of the governing body, alone or jointly with others, for carrying out the management of the conduct of the whole of the business (or relevant activities) of a firm* [...]".[736] Besides these prescribed responsibilities, the SoR necessarily must include all responsibilities which the individual effectively holds.[737] In certain cases, such as a job-sharing arrangement, an institution might be allowed to have more than one person performing a senior management function. Consequently, each individual remains accountable for all the responsibilities attached to that function, to prevent ambiguity in how responsibility is allocated.[738] However, certain combinations and responsibility-sharing arrangements are banned. Specifically, it is not allowed to combine or share the functions of the CEO and chair of the governing body.[739] The SoR must be submitted in a predefined template.[740] For the areas assigned to their statement of responsibilities, the senior manager then has a *duty of responsibility*.[741]

731 Kokkinis/Miglionico, 241; FSMA 2000 ss 60(2A-2C); PRA, Rulebook CRR Firms, Allocation of Responsibilities, n 2.2.

732 PRA, SS28/15, n 2.22 et seq.

733 Shalchi, UK House of Commons Library Briefing 2021, 13; Hickman, Mod. Law Rev. 2022, 7; PRA, SS28/15, n 2.25; for the list of the PRA, see PRA, Rulebook CRR Firms, Allocation of Responsibilities, n 4.1.

734 PRA, SS28/15, n 2.22 et seq.

735 PRA, Rulebook CRR Firms, Senior Management Functions, n 4.2.

736 PRA, Rulebook CRR Firms, Senior Management Functions, n 3.2.

737 Emmenegger, AJP 2022, 824; FSMA 2000 s 64A(2).

738 Allen, BoE Bulletin Q3 2018, 5.

739 PRA, SS28/15, n 2.20.

740 Emmenegger, AJP 2022, 824.

741 Allen, BoE Bulletin Q3 2018, 12; Shalchi, UK House of Commons Library Briefing 2021, 12; see also PRA, SS28/15, n 2.59-2.67. The duty of responsibility is especially relevant in a

The statements of responsibilities also constitute the foundation of the "Management Responsibility Map" (MRM).[742] This aims to illustrate how individual responsibilities fit within the bank's governance structure and their relation to each other.[743] It consolidates information on a firm's management and governance arrangements into an accessible, clear and comprehensive single source of reference, and the PRA considers it as the governance equivalent to a business plan.[744] By doing so, the MRM aims to ensure that there are no gaps in accountability.[745] While there is no template for such, the PRA provides guidance on its expected setup and the information it must include.[746] 234

To ensure the effectiveness and adherence to these two documents (SoR and MRM), banks are required to formulate them in a comprehensive way, including a consistent structure and an appropriate level of detail.[747] Both of these documents should promote clarity and transparency on the individual responsibilities of each senior manager, as well as the bank's management and governance arrangements, to serve not only the regulators but also the firms.[748] Despite the preventive scope highlighted by the PRA, the documentation primarily serves to determine accountability in case of misconduct rather than evaluating the individual's suitability for the role.[749] 235

1.2. Certified Functions

As mentioned earlier, the so-called certified functions are subject to some form of evaluation and certification before they can assume a position.[750] There is a large list of roles which are considered significant harm functions or material risk takers. For example, heads of important business units can be considered as such, as well as heads of legal affairs. While not qualifying as SMFs, such positions nonetheless involve performing duties which may cause significant harm to the bank or its customers and are therefore subject to so- 236

potential enforcement procedure, see n 414 of this thesis for a detailed discussion in this phase.

742 Green/Johnston/Williams, COB 2017, 18; PRA, Rulebook CRR Firms, Allocation of Responsibilities, n 7.

743 Hickman, 7 Mod. Law Rev. 2022.

744 PRA, SS28/15, n 2.57.

745 Green/Johnston/Williams, COB 2017, 18.

746 PRA, SS28/15, n 2.57A, 2.58.

747 PRA, SS28/15, n 2.46F; see also n 2.47-2.53 for guidance and expectations of the PRA regarding the completeness, clarity and level of detail and consistency of the SoRs.

748 PRA, SS28/15, n 2.46A, C.

749 Emmenegger, AJP 2022, 824 et seq.; see also PRA, SS28/15, n 2.46E.

750 See n 114 herein.

called suitability assessments.[751] In these, it is evaluated whether such individuals are fit and proper for their positions, and their regulatory references are examined. As such functions do not require an approval from authorities, the onus is solely on the bank to independently evaluate these individuals and issue a certificate specifying the involved aspects of affairs.[752]

2. Conduct Rules

237 Upon becoming a subject under the SM&CR regime, the relevant individuals must adhere to conduct rules, which both of the authorities are empowered to prescribe.[753] There exists a basic set of general rules by both the FCA and the PRA, which applies to all employees under the regime and are almost identical. Moreover, there is an additional set of rules by the PRA only applicable to senior management functions, given the authority's specific focus on preventing prudential harm.[754]

238 In summary, the six general conduct rules require individuals to act with integrity, due skill, care, and diligence and to be open and cooperative with the authorities.[755] Furthermore, depending on the circumstances, two customer-related rules and one market-related rule apply.[756] A second tier of an additional four conduct rules applies only to individuals holding a senior management function.[757] Accordingly, such a person must take reasonable steps to ensure the business of the firm within their area of responsibility is controlled effectively; and also to ensure the bank is compliant with regulatory require-

751 Chiu/Wilson, 517; FCA/PRA, CP14/13/CP14/14, n 1.20; FSMA 2000 s 63E(5); see also PRA, Rulebook CRR Firms, Certification, n 1.2 which qualifies such individuals as significant risk takers, and defines them as "*an employee of a CRR firm whose professional activities have a material impact on the firm's risk profile*".

752 Kokkinis/Miglionico, 242; Allen, BoE Bulletin Q3 2018, 6; Green/Johnston/Williams, COB 2017, 17; FSMA 2000 ss 63E, 63F; PRA, Rulebook CRR Firms, Fitness and Propriety, n 4.2.

753 Kokkinis, Corporate law, 129; FSMA 2000 ss 64-65.

754 FCA/PRA, CP14/13/CP14/14, n 1.24. For the general PRA rules see PRA, Rulebook CRR Firms, Conduct Rules, n 2; for the general FCA rules see FCA, COCON Rules 2.1. Most of the rules are identical, exceptions are the FCA, COCON Rules 2.1.3-2.1.6 concerning the interests of customers, the observation of market standards and good outcomes for retail customers, which are solely included in the FCA rules.

755 Allen, BoE Bulletin Q3 2018, 6; Hickman, Mod. Law Rev. 2022, 10; see PRA, Rulebook CRR Firms, Conduct Rules, n 2.1-2.3; FCA, COCON Rules 2.1.1-2.1.3.

756 Emmenegger, AJP 2022, 825; see FCA, COCON Rules 2.1.4-2.1.6.

757 See Emmenegger, AJP 2022, 825; Shalchi, UK House of Commons Library Briefing 2021, 14 for a similar overview as the one that follows. The PRA and FCA rules are identical.

ments within the subsequent area of responsibility.[758] If the senior manager delegates a task, appropriate measures must be taken to ensure that the delegation is made to suitable individuals and that the discharge of the delegated responsibility can be overseen effectively.[759] Lastly, it is required all information that the regulatory authorities would reasonably expect to be notified of must be disclosed accordingly, in a manner that is deemed appropriate.[760]

Banks must contractually oblige senior managers and certified functions to adhere to the conduct rules applicable to them.[761] The institution must also ensure that all persons subject to the conduct rules are in their knowledge and provide suitable training. The institutions must notify the regulators if they take action against any employee for a violation of conduct rules.[762] The authorities can furthermore impose sanctions in case of breach of any of these rules.[763] 239

B. The Netherlands

The Netherlands also has a classic fit and proper assessment regarding senior management individuals in place. Its herein relevant emerging approach focusing on behaviour and culture does not encompass a specific means with regards to the authorisation for senior management.[764] Rather, it coexists along the fit and proper testing which assesses the capacity, integrity, and suitability of individuals for senior positions, while behaviour and culture supervision is focused on institutions, evaluating risks associated with their behaviour and culture. These supervisory tasks are carried out by the DNB in separate expert centres that share information as needed.[765] However, as previously mentioned, there is an element in its heightened focus on culture su- 240

758 PRA, Rulebook CRR Firms, Conduct Rules, n 3.1; FCA, COCON Rule 2.2.1; PRA, Rulebook CRR Firms, Conduct Rules, n 3.2; FCA, COCON Rule 2.2.2.

759 PRA, Rulebook CRR Firms, Conduct Rules, n 3.3; FCA, COCON Rule 2.2.3.

760 PRA, Rulebook CRR Firms, Conduct Rules, n 3.4; FCA, COCON Rule 2.2.4.

761 Kokkinis/Miglionico, 243; Rulebook CRR Firms, Fitness and Propriety, n 3.1-3.2; hence the senior management functions are contractually obliged to the compliance with the basic and specific conduct rules, and the certified persons with the basic conduct rules.

762 Shalchi, UK House of Commons Library Briefing 2021, 14; FSMA 2000 ss 64B(3), 64C.

763 Kokkinis/Miglionico, 243; FSMA 2000 ss 66-67; see also n 417 of this thesis where the enforcement is discussed further.

764 FSA 3:8 and 3:9; Busch/Palm-Steyerberg, Governance of Financial Institutions, Chap. 8 n 8.48-8.51. For an overview on the Dutch setup and the rationale of the approach see n 122-134 of this thesis.

765 Römer, DNB Supervision of Behaviour and Culture, 163 et seq.

pervision which is worth outlining, namely the banker's oath and the subsequent conduct rules, which today apply to all bank employees, but were initially only foreseen for senior management.[766]

241 The legal basis for the senior management of banks to take the oath constitutes the same provision which sets forth the fitness and propriety requirements. It is complemented by the "Oath or Affirmation Financial Sector Regulation" (*Regeling eed of belofte financiële sector*).[767] The written oath is formulated by the Dutch Banking Association and subject to a signature by the oath taker. It emphasises ethical conduct and responsibility. Individuals thereby promise to act ethically and carefully, balancing the interests of stakeholders, with a primary focus on customers. In addition, compliance with laws, confidentiality, and the avoidance of knowledge abuse are essential, along with a commitment to transparency, accountability, and building trust in the financial sector. The oath concludes with a solemn declaration, signifying their dedication to these principles.[768] Besides the signature, people who take the oath are required to participate in a special ceremony.[769] The oath has to be taken upon assuming the respective position in the financial sector and at the latest within three months after the initial appointment. For senior managers, failing to take the oath can have negative implications with regards to their fitness and propriety assessment.[770]

242 By swearing on the oath the person must also abide by the conduct rules.[771] These are included in the self-regulatory pact "Future-oriented Banking", which was developed by the industry members of the Dutch Banking Association.[772] The seven rules further outline what is expected under the banker's oath and require employees to: work with care and integrity; weigh interests carefully; put customer's interests first; comply with the law and other applicable rules; keep confidential rules secret; be transparent and honest about conduct and aware of your responsibilities to society; and to contribute to society's confidence in the bank.[773] Since 2015 the oath has been linked to statutory disciplinary law. People who have taken the banker's oath and infringe the

766 See n 134 herein.
767 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.06; the legal basis for the oath for senior management is found in FSA 3:8 (2), for further employees in FSA 3:17b.
768 See NVB, Toekomstgericht Bankieren, Gedragsregels, 10-11.
769 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.08.
770 Soeharno, Financieel Recht 2014, 244, 246.
771 NVB, Toekomstgericht Bankieren, Gedragsregels, 9.
772 NVB, Toekomstgericht Bankieren, Gedragsregels, 3.
773 NVB, Toekomstgericht Bankieren, Gedragsregels, 4-6.

relevant rules of conduct can be sanctioned by the Dutch Banking Disciplinary Committee (*Tuchtcommissie Banken*), which is not a governmental authority but rather deemed a (semi) private institution.[774]

[774] LAAPER/BUSCH, Governance of Financial Institutions, Chap. 18 n 18.09. See also n 420-422 of this thesis where this element is discussed in more detail.

Part 3: Ongoing Supervision

Following the preceding exploration of foundational regulatory requirements and their initial assessment in the course of the authorisation procedure, this section delves into the ensuing phase of the Swiss supervisory law life cycle: ongoing supervision. It analyses the tools the supervisory authority has at its disposal for the monitoring of continuous adherence to the prerequisites which concern senior management of banks. The analysis unfolds from an organisational perspective, illustrating the mechanisms through which these individuals are monitored under the applicable prudential corporate governance framework. Thereafter, the oversight of personnel requirements is elucidated. From this in-depth examination of the Swiss setup the results are then derived. Finally, the emerging approaches of the model jurisdictions regarding senior management oversight are presented.

I. Analysis

A. Supervision as an Element of the Supervisory Law Life Cycle

1. Conceptual Definition

243 Supervision in the herein context can refer to the *authority* of financial market supervision in general. In this broader sense, the term refers to the licensing, the ongoing supervision and the enforcement of supervisory provisions as a complete system. In a narrower sense, the *supervisory activity* as an aspect of *supervision* describes the act of *monitoring* and hence ongoing institutional supervision. This constitutes one of FINMA's core activities and includes the monitoring of banks.[775] This so-called *prudential supervision* describes the forward-looking oversight of the financial market participants (therefore more specifically also: microprudential supervision).[776] Supervision, monitoring and oversight are used as synonyms in the following.

244 The supervisory activity discussed in the following section is thus to be distinguished from other forms of supervision by FINMA, particularly from its *conduct supervision*.[777] In such, the supervisory subjects are the rules of conduct as a collective term for behavioural rules in the financial market, which particularly address aspects from the relationship of banks to its clients.[778] The most prominent example of behavioural rules are anti-money laundering regulations.[779] To the herein central provision of BankA 3 II c, certainly an element of

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775 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 56. Accordingly, the supervisory activity also covers securities dealers, insurance companies, fund management companies, custodian banks, asset managers, and financial market infrastructures, see cited source for details.

776 STALDER, Bankgeschäft, n 209.

777 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 56. Additionally, FINMA exercises market supervision. Market supervision focuses on securities trading, takeovers, and disclosures. This kind of supervision is not limited to financial market institutions but applies to all listed companies. It also conducts product supervision (e.g. regarding collective investment schemes and supplementary health insurance), see cited source for details.

778 NOBEL, § 1 n 191.

779 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 56. Further examples include e.g. know your customer rules or conduct rules in the securities trading sector (e.g. FinSA 7); selected professional rules of the Swiss Bankers Association; as well as information, diligence, and loyalty obligations. Also, further financial market criminal law provisions that prohibit certain

conduct can be attributed as it is well known to impose general requirements on the personality, character, and regulatory compliance of bank senior management.[780] From a monitoring perspective however, the oversight of this provision is clearly integrated into prudential supervision. This is insofar comprehensible as the irreproachability guarantee is embedded into the institutional requirements of a bank.[781]

Finally, *microprudential supervision* of financial market participants must be distinguished from *macroprudential supervision*, which encompasses supervision of financial stability as a whole.[782] 245

2. Function and Objective

In accordance with FINMASA 4, the ongoing supervision of banks by FINMA aims to protect depositors and ensure the proper functioning of financial markets, in accordance with financial market laws.[783] The primary goal of FINMA's supervisory oversight is therefore to ensure and, if necessary, restore compliance with the law.[784] 246

Prudential supervision is considered the most important tool for the oversight of financial market participants.[785] FINMA is primarily focused on the ongoing supervision of the permanent fulfilment of licensing requirements, including organisational, personnel and financial prerequisites.[786] More specifically, adherence to regulations that essentially aim to ensure the solvency, liquidity, risk control, and diligent management of supervised institutions is monitored.[787] With regard to the present context, therefore, the analysis of the monitoring of organisational requirements, with its respective corporate gov- 247

behaviours, such as market abuse, can also be subsumed under conduct supervision, see NOBEL, § 1 n 193-195, § 7 n 829-859; STALDER, Bankgeschäft, n 540-545.

780 NOBEL, § 1 n 192. Pro memoria: BankA 3 II c requires people who are entrusted with the administration and management of a bank to provide a good reputation and guarantee for irreproachable business conduct, cf. n 192 et seqq. of this thesis.

781 See also n 147 et seq. herein.

782 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 65; this kind of supervision is shared between FINMA and the Swiss National Bank (SNB).

783 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 62.

784 KUNZ, § 3 n 179.

785 STALDER, Bankgeschäft, n 209.

786 KUNZ, § 3 n 179; see also n 147 et seq. of this thesis for an overview on the licensing requirements.

787 Cf. BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 63.

ernance provisions, as well as personal requirements, are relevant, both of which count as central material supervisory concerns.[788]

248 Ongoing supervision follows a risk-oriented supervisory approach.[789] Accordingly, not every supervised entity is monitored with the same intensity. Rather, the examination is based on the risks that the supervised entity may pose to creditors or investors, as well as the functioning of financial markets (FINMASA 24 II).[790] High supervisory efforts are justified where there are significant risks, while small risks should not consume large resources.[791] For this purpose, supervised entities are classified into five supervisory categories and additionally are subject to a non-public rating system by FINMA.[792] This ensures that the supervisory authority uses its resources efficiently in accordance with the complexity and risk profile of the supervised entity, allowing for more intensive monitoring of (systemically) relevant institutions.[793] The most intensely supervised institutions constitute globally systemically relevant banks which are in supervisory category one, meaning that all supervisory instruments are used continuously or at least regularly.[794] This risk-oriented approach is in line with the administrative law principle of proportionality.[795]

788 Nobel, § 7 n 5.

789 FINMA, Erläuterungsbericht Prüfwesen 2012, 8.

790 Stalder, Bankgeschäft, n 211.

791 Bauer, EF 2021, 610.

792 Stalder, Bankgeschäft, n 211. To determine the supervisory intensity, banks are first categorised into five supervision categories based on their balance sheet totals, assets under management, privileged deposits, and required capital. Category 1 applies to large, significant, and complex institutions with high risk, ranging to category 5 for small institutions with low risk. Requirements for capital, organisation (risk management), and disclosure are the highest in category 1 and lowest in category 5. Moreover, FINMA gives a non-public rating based on its assessment of the institute's current state, which is also relevant for the evaluation. Corporate governance and the institution's business conduct are among the criteria assessed in this rating. Based on the categorisation and the rating, the intensity of supervision (including the supervisory concept, the use of appropriate instruments, and the interaction between direct and indirect supervision) is determined. Consequently, if two institutions of similar size are in the same supervision category, the intensity of supervision for both can vary significantly due to different risk ratings; see Blöchliger, Finanzmarktaufsicht, § 11 n 74-76; Bauer, EF 2021, 610.

793 Blöchliger, Finanzmarktaufsicht, § 11 n 73; Blumer/Zimmermann, Finanzmarktaufsicht, § 11 n 123.

794 Blöchliger, Finanzmarktaufsicht, § 11 n 79.

795 Blöchliger, Finanzmarktaufsicht, § 11 n 76; Bauer, EF 2021, 610. The principle of proportionality, as a principle of general administrative law, requires that the administrative measure is *suitable*, *necessary*, and *required* to achieve the goal underlying the public interest, see Häfelin/Müller/Uhlmann, n 514 et seqq. for details.

3. Overview on Instruments

The central instruments of ongoing supervision constitute the audits. These examine whether the institution has prepared its accounts as required (so-called financial audit) and whether it has complied with regulatory requirements (so-called regulatory audit).[796] The regulatory audit constitutes a core element of financial market supervision. In the course of the regulatory audit, it is examined whether regulatory requirements are being complied with and whether it can be assumed that they will be adhered to in the foreseeable future (FINMA-AO 2 I).[797] Furthermore, FINMA collects personal data which could be relevant to the irreproachability guarantee under BankA 3 II c on an ongoing basis and can, under certain circumstances, store such in its database (also often referred to as: watch list).[798] Also of relevance in the context of ongoing supervision are changes in senior management, which must be approved by the supervisory authority.[799] 249

Moreover, there are further oversight tools at FINMA's disposal. However, these are less institutionalised, documented, and accessible, which does not allow for an in-depth analysis of these tools. For example, in addition to the basic audit, other types of audits are available, such as supplementary audits or case-related audits.[800] Furthermore, there is the possibility of so-called supervisory reviews and deep dives, which represent topic-specific controls and assessments.[801] Moreover, in 2020 the authority communicated that it commenced the operational implementation of the new supervisory approach aimed at strengthening corporate governance in (*inter alia*) large banks. 250

796 STALDER, Bankgeschäft, n 264; NOBEL, § 7 n 3; see n 252 et seqq. of this thesis for a detailed discussion of this instrument.

797 FINMA, Erläuterungsbericht Prüfwesen 2012, 6. Smaller institutions, which are out of scope for the present work, are potentially eligible for a reduced audit frequency of every two or four years instead of the annual audit, see FINMA-Circ. 13/3, n 86.1; FINMA, Erläuterungsbericht Prüfwesen 2017, 15.

798 See n 266 et seqq. herein for a detailed discussion of this aspect.

799 BAUER, EF 2021, 611; for a definition of senior management in the herein context see n 64-66 of this thesis.

800 FINMA, Erläuterungsbericht Prüfwesen 2012, 10. Additional audits are conducted on audit areas depending on the business model or risk situation of a supervised entity. Unlike the basic audit, they are less static and can be ordered according to current developments or changes in the risk situation. If the targeted use of specialists is necessary, case-specific audits can also be conducted. A such audit is ordered via FINMASA 36, see cited source for details.

801 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 88; BLUMER/ZIMMERMANN, Finanzmarktaufsicht, § 11 n 138.

Thereby, key themes are assessed periodically regarding the effectiveness of corporate governance. Accordingly, potentially relevant issues or outliers should be revealed and necessary action identified.[802] In addition, within the framework of ongoing institutional supervision, there is a continuous supervisory dialogue and reporting between the supervised entities and FINMA. Ongoing information gathering and analysis are carried out through various reporting and notification obligations of the supervised entities to the supervisory authority and through direct exchanges with employees and governing bodies of supervised entities. Meetings with the board of directors and representatives of management on fundamental topics such as governance and organisation are at the centre of this dialogue. It provides a platform for FINMA to communicate its expectations, enables it to measure progress and to also gather information on specific projects of a bank, including corresponding risk and opportunity assessments.[803]

251 Building on the previously established dual-perspective strategy for regulating and supervising senior management, the ensuing analysis will examine the ongoing oversight of these individuals through the dimensions of both the organisational and personnel licensing requirements of banks.[804]

B. Instruments to Supervise Senior Management

1. Organisational Perspective

1.1. Regulatory Audit

1.1.1. *Outline of the Instrument*

1.1.1.1. Contextualisation in Bank Supervision

252 Regarding banks, FINMA is responsible for oversight on adherence with the provisions of the Banking Act, its accompanying provisions (particularly the Banking Ordinance), as well as rules of other financial market laws that affect banks through their business activities.[805] Accordingly, banks are required to

802 FINMA, Annual Report 2022, 33.
803 BLÖCHLIGER, Finanzmarktaufsicht, § 11 n 83.
804 See n 148 herein, where this dual-perspective strategy is identified.
805 BAUER, EF 2021, 608.

undergo regular regulatory audits (FINMA-AO 2 I).[806] It is concerned with the organisational elements and other supervisory aspects of the bank and is always conducted in relation to the business activities of the institution. The following discussion is concerned with the relevant aspects of the annually conducted *basic audit*, which will be outlined in the following section.[807] After a brief overview of this core instrument, an in-depth analysis will elucidate how the herein relevant organisational requirements and corporate governance provisions are examined in the course of an audit.[808]

1.1.1.2. Legal Foundations and Objective

The legal foundations for the regulatory audit are found in BankA 18 and FINMASA 24 which impose the general obligation on banks to an audit (following also: examination or assessment).[809] Additionally, the "Financial Market Audit Ordinance" (FINMA-AO) issued by the Federal Council regulates the basic principles for the content and procedure of the examination.[810] Specifically for the regulatory audit, FINMA has issued FINMA-Circular 2013/3 "Auditing" (FINMA-Circ. 13/3, *Prüfwesen*), which, together with the corresponding appendices, guidelines, audit points, minimum audit programmes, and reporting requirements, set forth the content of regulatory audits.[811] 253

Within the scope of the basic audit, adherence to the general regulatory requirements is regularly reviewed.[812] Following the risk-oriented audit approach, the focus of the examination is on risks that may arise from the supervised entity for depositors and the functioning of financial markets (cf. FINMASA 24).[813] 254

806 STALDER, Bankgeschäft, n 264; NOBEL, § 7 n 3.

807 FINMA, Erläuterungsbericht Prüfwesen 2012, 6.

808 For an explanation of corporate governance in a general manner see n 20-26, 30-35 and specifically for banks see n 36-50 of this thesis.

809 PFIFFNER, BSK FINMASA 24 n 170 et seq. The central questions of the audit are regulated across sectors in the FINMASA. The individual financial market laws (see FINMASA 1 I) contain specific provisions for the respective supervisory area, see PFIFFNER/WATTER, BSK BankA 18 n 2.

810 NOBEL, § 5 n 118, who also notes that FINMASA 24 IV authorises the Federal Council to outline the main aspects of the content and procedure of the audit.

811 BLUMER/ZIMMERMANN, Finanzmarktaufsicht, § 11 n 132.

812 FINMA, Erläuterungsbericht Prüfwesen 2012, 6.

813 PFIFFNER, BSK FINMASA 24 n 83.

1.1.1.3. Addressees

255 According to FINMASA 3, the persons who require licensing under the financial market laws are subject to financial market supervision (so-called supervised entities).[814] Therefore, banks belong to the group of supervised entities in accordance with their licensing obligation (cf. BankA 3). Natural persons in leading positions in a licensed institution who must provide a guarantee for irreproachable business conduct according to BankA 3 II c are indirectly addressed by the ongoing supervision of supervised entities.[815] The Federal Supreme Court also acknowledges that all persons, who are active in the financial market but not addressees of direct supervision, nor a party in a supervisory procedure themselves, are still subject to the mandatory supervision of FINMA.[816]

1.1.1.4. Auditors

256 The so-called dualistic supervisory system in Switzerland allows FINMA (direct supervisory authority) and also auditing firms (indirect supervisory authority) to carry out regulatory audits (cf. FINMASA 24). Auditing firms play a pivotal role in this system and are considered to be the extended arm of FINMA.[817] Such firms are mandated and remunerated by the supervised entities, more specifically by the entities' boards of directors.[818] The auditing firm must report on its findings to FINMA in the form of an audit report. If violations of supervisory regulations or other deficiencies are identified, the auditing company grants the supervised entity an appropriate time period to restore compliance. If the deadline is not met, FINMA must be informed (FINMASA 27 II). In contrast, in case of serious violations of supervisory regulations

814 Du Pasquier/Rayroux, BSK FINMASA 3 n 18. Bank groups are subject to consolidated supervision in accordance with BankA 3g in conjunction with BankO 24. The latter specifies the aspects to be audited (e.g. appropriate organisation, management by persons who provide a proper guarantee for proper business conduct), see Nobel, § 7 n 705. In such cases, separate reports must be submitted for the individual institutions and the group. With regards to corporate governance, the auditing firms must indicate whether the rules are adhered to at group level; see FINMA-Circ. 13/3, n 77; Pfiffner/Watter, BSK BankA 18 n 162; FINMA, Report Regulatory Audit, sec. 6.10.1.

815 Du Pasquier/Rayroux, BSK FINMASA 3 n 12.

816 FCD 143 I 253 consid. 6.5.2.

817 FINMA, Erläuterungsbericht Prüfwesen 2012, 6 et seq.; Nobel, § 5 n 106. The audit firms themselves are subject to oversight by the Federal Audit Oversight Authority (*Revisionsaufsichtsbehörde*), see e.g. Nobel, § 7 n 4. For the role of audit firms in the course of the authorisation process, see n 208 of this thesis.

818 Blumer/Zimmermann, Finanzmarktaufsicht, § 11 n 118.

or deficiencies, FINMA must be notified immediately (FINMASA 27 III).[819] In the case of large banks, FINMA is increasingly carrying out the audits itself (cf. BankA 23).[820]

While developed on grounds of resource efficiency and deeply anchored in the Swiss regulatory landscape, the dualistic supervisory approach has faced criticism due to concerns about the potential for conflicts of interest. With audit firms being both appointed and remunerated by the banks they are tasked with scrutinising, questions arise regarding whether these firms possess a genuine incentive to conduct exhaustive and critical assessments of their clients, even at the risk of jeopardising future business relations.[821] This dualistic supervisory approach was also raised as a potential topic for further review by the expert group on banking stability after the emergency takeover of Credit Suisse by UBS in March 2023, as it was seen as hindering the interaction of the banks and FINMA.[822] Earlier, this issue has already been brought forward by the International Monetary Fund (IMF).[823] The supervisory authority, also in reference to the IMF's criticism, stated it would welcome an investigation into the strengthening of the independence of the audit.[824] 257

1.1.1.5. Content

As stated previously, the content of the regulatory audit generally involves verifying whether the bank has complied with regulatory requirements. The range of these requirements, from formal legal provisions to industry association guidelines recognised as minimum standards, is broad in scope. As a result, the supervisory audit affords significant discretion. This requires the auditor to have a solid understanding of the banks' activities and regulatory requirements.[825] 258

The specific content of the audit is determined by FINMA.[826] Accordingly, FINMA defines mandatory *audit fields*, which specify the substance of regulatory audits (FINMA-AO 3 I). Additionally, the supervisory authority may estab- 259

819 Pfiffner, BSK FINMASA 27 n 72, 85; Nobel, § 5 n 107.

820 Nobel, § 7 n 3; Pfiffner, BSK FINMASA 24 n 74; Pfiffner/Watter, BSK BankA 18 n 12.

821 See e.g. Pfiffner/Watter, BSK BankA 18 n 1; Pfiffner, BSK FINMASA 24 n 10.

822 Expertengruppe Bankenstabilität, Report 2023, 59; see also fn 376 and n 6 of this thesis for a further discussion of the report.

823 IMF, Switzerland Country Report 2019 no. 19/184, n 22, see furthermore n 23-31 on the topic. See also see fn 369 of this thesis for a brief definition of the IMF as an organisation.

824 FINMA, Press Release Auditing-Circular 31.5.2023.

825 Blumer/Zimmermann, Finanzmarktaufsicht, § 11 n 116 et seq.

826 BBl 2006 2877.

lish further *audit objects* on an annual basis, to ensure tailored, targeted and institution-specific reviews, according to current circumstances (FINMA-AO 4).[827] Furthermore, it can issue detailed guidance for the supervisory audits of banks in the form of pre-defined *audit points* or *audit instructions*. Such generally concern aspects which are only dealt with in a summarised matter in the law.[828]

1.1.2. *Audit of Relevant Corporate Governance Provisions*

1.1.2.1. Corporate Governance in the Regulatory Audit

260 After the preceding outline on the cornerstones of the audit it will now be analysed how relevant provisions covering corporate governance are examined. According to its own statement, the oversight of the corporate governance of supervised entities is of great importance to FINMA. In particular, it considers the distribution of competencies between the board of directors and executive management, power concentrations, risk and control processes, rules for handling conflicts of interest or questions of accountability to be integral elements of its supervision.[829]

261 The audit of corporate governance is part of the standard auditing strategy and hence part of the minimum examination. It is covered by the mandatory audit fields *internal organisation and internal control system* (for individual institutions) and *corporate governance at group level* (for consolidated supervision).[830] For the former audit field, detailed *audit points for internal organisa-*

827 NOBEL, § 5 n 121.

828 PFIFFNER, BSK FINMASA 24 n 14. Such audit points or audit instructions result from the audit areas which are regulated by supervisory provisions and concern organisational structures or processes. These are then divided into audit fields, and within each audit field, the individual points to be distinguished or separately examined are identified, see FINMA, Erläuterungsbericht Prüfwesen 2012, 10. However, audit points do not necessarily provide a conclusive basis for audit actions and may need to be supplemented by the auditor, according to FINMA, Wegleitung Prüfgesellschaften, 6.

829 BRANSON, FINMA Corporate Governance 2015, 4 et seq.

830 FINMA, Erläuterungsbericht Prüfwesen 2017, 9; FINMA, Standardprüfstrategie Banken, 2. The standard audit strategy refers to the minimum audit requirements for each supervisory area, see FINMA-Circ. 13/3, n 29, as well as n 4, 28 et seqq. Depending on the initial risk assessment, the audit can be intensified beyond the standard auditing strategy, see also PFIFFNER/WATTER, BSK BankA 18 n 52 f.; FINMA, Wegleitung Prüfgesellschaften, 6; FINMA, Erläuterungsbericht Prüfwesen 2017, 15-18. Furthermore see n 248 of this thesis regarding the risk-based approach in general and n 259 for an explanation of the term audit fields.

tion and control internal system exist. Among others, the underlying regulations to be examined in this context are organisational framework conditions for banks and their corporate bodies according to BankA 3 II a in conjunction with BankO 11, as well as the majority of the herein relevant provisions in FINMA-Circ. 17/1 (n 1-61, 63, 98-105).[831] Accordingly, this shows *which* aspects of corporate governance are part of the basic audit. The ensuing discussion elucidates the evaluated relevant audit points for internal organisation and control internal system, structured in a manner to serve the purposes herein.[832]

1.1.2.2. Audit Points

a. Organisational Structure and Separation of Governing Bodies

Regarding the *organisational structure* and the *separation of governing bodies* the organisational chart must be examined, as well as whether the separation of the board of directors and the executive board has been implemented in accordance with BankA 3 II a in conjunction with BankO 11.[833] Furthermore, responsible departments must be identified using the organisational charts and it ought to be assessed whether the organisation of key functions is adequate. For the key functions, an assessment is required to examine whether responsibilities and competencies are defined in written policies. It must also be assessed whether the bank has defined the key functions responsibilities and competencies in written policies, which are made available to and known by them. Furthermore, the auditor must obtain an overview of all internal directives and policies and assess whether the relevant aspects of the entity's activities are adequately addressed. Through inquiries it must examine their processes for establishing and updating these internal rules. If a deeper audit is required, this has to be done through sample examinations of key internal directives and testing of operating effectiveness of identified key controls.[834] 262

831 FINMA, Audit Points Internal Organisation, 2.

832 The document "Audit points for internal organisation and internal control system" is more extensive and follows a different structure along the following audit points: adequacy of internal organisation; adequacy of internal directives; adequacy of internal control system; measures to adequately limit conflicts of interest; internal reporting; risk policy and principles of institution-wide risk management.

833 See n 183 et seq. herein for a discussion of these requirements.

834 FINMA, Audit Points Internal Organisation, 6 et seq.; see fn 830 of this thesis regarding the depths of the audit.

b. Board of Directors

263 Specifically concerning the *board of directors*, it is assessed whether the committee consists of at least three members and whether it has sufficient competencies, banking and financial sector knowledge, and is adequately diverse.[835] Further, its adherence to independence principles has to be examined, according to which least one-third of its members must be independent.[836] In addition, this body's compliance with directorship principles, including the members' time commitment, approval of competence profiles, and conduction of an annual self-assessment of its performance, are assessed.[837] Furthermore, the handling of conflict of interests by the board of directors is part of the audit. In case of a more in-depth audit, this is done through questioning whether conflict of interests could not be avoided and an assessment based on a sampling on whether the measures taken were appropriate.[838]

264 It is moreover examined if the body fulfils the tasks and responsibilities prescribed in FINMA-Circ. 17/1, n 10-15, so for example whether it installed a suitable organisational structure and set forward the business strategy; and whether it effectively oversees the executive board, including if these bodies meet regularly and discuss the board of directors' assessment of the appropriateness and effectiveness of internal controls. For instances where a more in-depth audit must be conducted, these meetings are assessed through a review of minutes.[839] Lastly, under the general audit it is also required to evaluate whether the president of the board of directors represents the bank internally and externally and significantly influences the strategy, communication and culture of the institution.[840]

c. Executive Board

265 With regard to the *executive board* it is examined whether this corporate body has sufficient management competences, knowledge and experience of the banking and financial sector.[841] Furthermore, it is required to review whether the body implements the instructions of the board of directors concerning op-

835 FINMA, Audit Points Internal Organisation, 3 et seq.; cf. FINMA-Circ. 17/1, n 16; see also n 185-189 of this thesis for a detailed discussion of the board of directors.
836 FINMA, Audit Points Internal Organisation, 4; cf. FINMA-Circ. 17/1, n 17-25.
837 FINMA, Audit Points Internal Organisation, 4; cf. FINMA-Circ. 17/1, n 26-28.
838 FINMA, Audit Points Internal Organisation, 9; cf. FINMA-Circ. 17/1, n 29.
839 FINMA, Audit Points Internal Organisation, 4, 7.
840 FINMA, Audit Points Internal Organisation, 4; cf. FINMA-Circ. 17/1, n 30.
841 FINMA, Audit Points Internal Organisation, 4; cf. FINMA-Circ. 17/1, n 51.

erational business activities, in accordance with the strategy and the establishment, maintaining and regular supervision of internal controls. If a more in-depth audit is required, this is done through inspection of the documentation related to the examination of the appropriateness of the internal control system and an assessment of the adequacy of the discussions and decisions taken.[842] Generally it must further be assessed whether the executive board ensures an appropriate separation of functions and avoids the allocation of conflicting responsibilities.[843]

1.1.2.3. Audit Intensity

With regards to the intensity of the audit, the audit field internal organisation and internal control system does not have to be audited in its entirety every year. Rather, the whole of the designated audit points must be audited over six years, with the depth of the audit being left at the discretion of the auditor.[844] The audit field corporate governance at group level must be critically assessed annually, it is however not further specified in audit points and thereby it remains unclear what exactly is audited in this regard.[845] This setup, characterised by its broadness and the great discretion it leaves to the auditors, is generally consistent with FINMA's statement, according to which the weaker corporate governance of an institution is considered, the more intense the supervision is. Conversely, supervision becomes less intense the greater the trust in the responsible individuals and the control processes of the supervised entities.[846] This practice is also in line with the risk-oriented approach of the ongoing supervision.[847] 266

1.1.2.4. Audit Report

Finally, in the audit report it must (*inter alia*) be confirmed that: regulations and principles of corporate governance have been complied with; the board of directors and the executive board are adequately separated; and the guidelines and principles of corporate governance at group level have been adhered to.[848] 267

842 FINMA, Audit Points Internal Organisation, 8; cf. FINMA-Circ. 17/1, n 47-50.
843 FINMA, Audit Points Internal Organisation, 9.
844 FINMA-Circ. 13/3, n 97; for an explanation of the audit points see n 259 of this thesis.
845 FINMA-Circ. 13/3, n 101.
846 Branson, FINMA Corporate Governance 2015, 2.
847 Bauer, EF 2021, 610.
848 Pfiffner/Watter, BSK BankA 18 n 141; FINMA, Audit Points Internal Organisation, 1; FINMA, Report Regulatory Audit, sec. 6.5.2, 6.5.10.

In addition, according to minimum requirements of the audit report, a graphical representation of the group structure, including shareholdings as well as the organisational charts showing the responsible persons for each business area or department, must be submitted.[849]

1.2. Review on Supervision of Corporate Governance by the IMF

268 The Swiss approach to supervising corporate governance in banks was reviewed by the International Monetary Fund (IMF) in its Financial Sector Assessment in 2019.[850] While positively acknowledging the mandatory nature of corporate governance assessments in annual audits, the IMF highlighted that while corporate governance must be *broadly* assessed, it questioned whether these audits are sufficiently linked to the assessment of practices for which the governing bodies are responsible.[851] Specifically, it was criticised that Switzerland's approach to supervision of corporate governance does not require an explicit written assessment of the effectiveness of the banks' senior management, but rather concerns regarding corporate governance are raised by FINMA in its annual assessment letter to banks, if considered substantial. This was perceived as undermining the importance of senior management and impeding to the proper attribution of responsibilities and accountability to these parties.[852] It was also observed that senior management was not subjected to thorough examination within the supervisory audits, despite enhancements to the articulation of corporate governance-related expectations through the issuance of FINMA-Circ. 17/1.[853]

269 With regards to the herein researched context it is furthermore worth mentioning that the IMF sees the supervision of corporate governance and developing an integrated view of how well the bank is being run as one of the least well-suited areas to be covered by external auditors. It moreover raised its concerns regarding the previously discussed conflicts of interests which are inherent in the Swiss dualistic supervisory approach. Therefore, it advocates for more attention by FINMA directly or through the use of mandataries.[854]

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849 FINMA, Wegleitung Prüfgesellschaften, 5.

850 IMF, Switzerland Country Report 2019 no. 19/184. See fn 369 of this thesis for a brief definition of the IMF as an organisation.

851 IMF, Switzerland Country Report 2019 no. 19/184, n 66.

852 IMF, Switzerland Country Report 2019 no. 19/184, n 65.

853 IMF, Switzerland Country Report 2019 no. 19/184, n 65.

854 IMF, Switzerland Country Report 2019 no. 19/184, n 66; see also n 256 et seq. of this thesis for the Swiss dualistic supervisory approach in general.

Furthermore, it identifies a growing importance of the banks' corporate bodies to ensure strong risk management and internal control processes, given the increasing risk-based approach in the use of external auditors.[855]

The IMF urged Switzerland to forge ahead and, even in the face of potential resistance, intensify its efforts to bolster the accountability of senior management. More concretely, efforts should raise the bar on the accountability of senior management with respect to ensuring these firms are run in a prudent matter and are taking steps to ensure effective risk management and control functions are in place.[856] 270

2. Personnel Perspective

2.1. Audit of the Guarantee of Irreproachable Business Conduct?

While the supervised entities, and hence for example banks, are the direct addressees of ongoing supervision, the requirement for certain individuals to guarantee irreproachable business conduct (cf. BankA 3 II c) must also be continuously adhered to, not just at the time of the licensing of an institution.[857] Whether persons mandated with the administration or the management of a bank effectively provide irreproachable business conduct is evident not least through their behaviour in ongoing business operations.[858] 271

Per FINMA's own assertion, it continuously verifies whether individual persons in senior management positions, as well as the institution itself, meet the requirements of the guarantee of irreproachable business conduct. In addition, the evaluation of the level of integrity of senior management constitutes one of the relevant aspects which is determined through conversations with senior management of supervised entities, to gain insights on how the bank is run and whether sufficient control mechanisms are in place.[859] Moreover, the Swiss Federal Supreme Court stated that the events which occurred in the fi- 272

855 IMF, Switzerland Country Report 2019 no. 19/184, n 30.

856 IMF, Switzerland Country Report 2019 no. 19/184, n 39.

857 Instead of many see e.g. WINZELER, BSK BankA 3 n 2; KLEINER/SCHWOB, SK BankA 3 n 12 et seq.; CHATTON, AJP 2011, 1206; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.2; FCD 108 Ib 196 consid. 2b; FCD 142 II 243 consid. 2.2; FAC decision B-2204/2011 (2012/33) from 24 July 2012 consid. 10.1. See n 192 of this thesis for a discussion of the irreproachability guarantee as a licensing requirement.

858 AELLEN, 217.

859 BRANSON, FINMA Corporate Governance 2015, 3 et seq.

nancial markets during the first decade of the 21st century demonstrated the necessity for strict control of business conduct in the financial market.[860] In addition, from an international perspective, the Financial Stability Board (FSB) highlights the paramount importance of ongoing supervision of employees in the financial sector in general, especially with regards to their conduct.[861]

273 The previous analysis concerning the basic audit shows however that the provision of the guarantee of irreproachable business conduct is not mentioned as a relevant regulatory requirement to be assessed with regards to the internal organisation and internal control system audit field, nor is it in any other.[862] Consequently, there are currently no specific audit points which examine the adherence to this requirement in its entirety. Aspects of the irreproachability guarantee are however audited through the examination of the internal organisation. It is thereby assessed whether the governing bodies possess sufficient leadership skills, necessary expertise and experience in the banking and financial market sector, and if the board of directors is sufficiently diversified. Hence, this concerns mostly the individuals' professional competence (also: fitness) and less their irreproachability (also: properness).[863] In addition, in the *audit report* of the overall assessment it must be confirmed that no findings were made which would call into question the guarantee of irreproachable business conduct by the corporate bodies (or qualified participants), and significant changes in a bank, including such regarding members of the corporate bodies, must also be mentioned in the report.[864] Hence, the requirement of the guarantee of irreproachable business conduct of individuals is seemingly not systematically nor proactively assessed for all supervised entities in the course of the regulatory audit, even though personnel requirements are part of the banks' licensing requirements.[865]

860 FCD 143 I 253 consid. 6.5.2. This statement was made in discussion of the watch list and its general goal to assure that certain individuals provide for the guarantee of irreproachable business conduct. The watch list will be discussed in n 274 et seqq. of this thesis.

861 FSB, Toolkit 2018, 43-44.

862 Cf. especially FINMA, Audit Points Internal Organisation or the subsequent "Audit points for compliance with market conduct rules" which show the closest link to the herein discussed issues (further audit points e.g. concern the confidentiality of client data or anti-money laundering and are therefore generally out of scope).

863 FINMA, Audit Points Internal Organisation, 4; cf. FINMA-Circ. 17/1, n 16, 51.

864 FINMA-Circ. 13/3, n 68; FINMA, Report Regulatory Audit, sec. 4.7.1.

865 Reiser, SZW 2022, 544.

2.2. Processing and Storage of Personal Data in Supervision

2.2.1. *Scope and Legal Foundations*

Whilst there is no thorough formalised ongoing supervision of the guarantee of irreproachable business conduct, FINMA reacts in cases where information is present which could be relevant to BankA 3 II c. Such information can, for example, be obtained by FINMA directly from the supervised entities or from auditing firms. Both are legally obligated to report incidents of significant importance to FINMA, which also includes irreproachability guarantee-relevant events (so-called *reporting obligation*, FINMASA 29 II).[866] Moreover, FINMA collects personal data of relevant individuals on an ongoing basis. This has been a long-standing element of financial market supervision.[867] Initially, the handling of personal data by the Swiss Federal Banking Commission (FBC, FINMA's predecessor authority) was rather informal, which is why the legitimacy of this official action was (and to some extent still is) controversial in its very fundaments.[868] Since its establishment in 2009, FINMA has also been making use of data processing and collection. Over time, and in the course of revisions of the subsequent legal foundations, the instrument has become increasingly formalised.[869] Comprehensive information about supervised entities and financial market participants is a crucial prerequisite for the effective exercise of financial market supervision.[870] Therefore, FINMA processes personal data of both legal and natural persons in order to fulfil its statutory mandate (cf. FINMASA 4).[871] 274

Today, FINMA is explicitly authorised to process personal data given its supervisory function (cf. FINMASA 23 I). According to FINMASA 23 II, it may do so, *inter alia*, for the purpose of supervision (lit. b), the assessment of the guarantee of irreproachable business conduct (lit. d), or the assessment of the behaviour of a person working at a supervised institution (lit. e). By the same provision, FINMA is also obligated to set forth rules that govern the details of data processing (FINMASA 23 IV). It followed suit by issuing the "FINMA Ordinance 275

866 Zulauf, FINMA Sonderbulletin 2013, 27; Reiser, SZW 2022, 544.

867 Cf. e.g. FBC, Jahresbericht 2003, 50 et seq. Cf. FADP 5 (Federal Act on Data Protection) for a definition of personal data in general, furthermore regarding the data relevant in the present context see FINMA-DataO 5, FINMA-DataO 11.

868 See e.g. Winzeler, BSK BankA 3 n 18 et seqq.; Kleiner/Schwob, SK BankA 3 n 247; Lombardini, Chap. IV, n 72-77.

869 Cf. e.g. FINMA, Annual Report 2017, 88.

870 Nobel, § 5 n 161 et seq.

871 FINMA, Erläuterungsbericht DatenVO 2022, 6.

on the Processing of Personal Data in Supervision" (FINMA-DataO, *Verordnung der FINMA über die Bearbeitung von Personendaten im Rahmen der Aufsicht, Datenverordnung FINMA*).[872]

276 Data processed by FINMA may be relevant for assessing the irreproachability guarantee of a person in the future. This information is stored in its database (cf. FINMA-DataO 9).[873] This "Database to Ensure the Assessment of the Irreproachability Guarantee" (*Datenbank zur Sicherstellung der Gewährsbeurteilung*; hereinafter referred to as the database, or watch list), is a database under the Swiss Federal Act on Data Protection (FADP) and must be set up and managed in accordance with the provisions of this act.[874]

277 The database serves as a tool for centralising information gathered by FINMA and making it accessible for its intended purposes.[875] The entries are considered exclusively as internal knowledge management for FINMA and help selected employees of the authority to evaluate whether additional verifications are necessary in case of an irreproachability guarantee assessment.[876] Therefore this "stockpiling of data" is seen as a crucial element to ensure effective financial market supervision.[877] Accordingly, the watch list is intended to ensure that institutions only entrust individuals with supervisory or executive functions who provide the guarantee of irreproachable business conduct. In particular, it aims to prevent improper business conduct which occurred in a previous position from recurring at a future employer.[878] The official interest of the watch list is thus identical to that of the public: to reduce the risk that relevant information for the irreproachability guarantee assessment is over-

872 Rayroux/Conti, BSK FINMASA 23 n 8; Zulauf, FINMA Sonderbulletin 2013, 28; Beck, n 340; FINMASA 23 II was newly added on 1. September 2023 and specifies the scope of application of the norm (it was implemented in the course of a revision of the FADP, cf. BBl 2017 6941).

873 FINMA, Erläuterungen DatenVO 2023, 10; Nobel, § 5 n 161 et seq.

874 Zulauf, FINMA Sonderbulletin 2013, 28; the terms watch list and database are used interchangeably, cf. e.g. FINMA, Erläuterungsbericht FINMA-DataVO 2012, 3 (which refers to the old term data collection, with the introduction of the revised FADP and the revision of the FINMA-DataO the term database was introduced).

875 Grob/von der Crone, SZW 2017, 857.

876 Zulauf, FINMA Sonderbulletin 2013, 28; FINMA, FINMA, Erläuterungen DatenVO 2023, 10; FINMA, Annual Report 2017, 88; Rayroux/Conti, BSK FINMASA 23 n 9; for details regarding access rights to the data see FINMA-DataO 4, 10 and FINMA, Erläuterungen DatenVO 2023, 6,10.

877 Bertschinger, SZW 2017, 844, referring to a similar statement in FCD 143 I 253 consid. 4.5; see also Grob/von der Crone, SZW 2017, 857.

878 FINMA, Annual Report 2017, 88; FINMA, FINMA, Erläuterungen DatenVO 2023, 9; Bertschinger, SZW 2017, 844; FCD 143 I 253 consid. 6.4.3.

looked.[879] In FINMA's maintenance of this database, some recognise a form of irreproachability monitoring.[880] The Swiss approach to the data storage of said individuals has been presented as best practice example by the Financial Stability Board (FSB) as a means to address the "bad apples" phenomenon, which pertains to the prevention of individuals with a history of misconduct taking on new positions in the financial industry.[881]

278 Given the competence rule in FINMASA 23 I, the Federal Supreme Court recognises the general legality of the database, as the provision is deemed to provide for a sufficient formal and legal basis.[882] Still, the processing of data, or the entry of data into the watch list, can interfere with fundamental rights of the concerned individual. Particularly, it may affect one's right to economic freedom (FCSC 27), since it potentially impacts the person's professional activities and furthermore affects a person's right to privacy, or more specifically, to informational self-determination according to FCSC 13 II.[883] As a result, FINMA operates in a tension between ensuring an effective irreproachability guarantee practice and the protection of the rights of those affected by an entry into the database.[884]

2.2.2. *Processing*

279 According to FINMA-DataO 5, FINMA may process a variety of personal data within the scope of its statutory mandate, in particular for the purposes foreseen in FINMASA 23 II.[885] It is allowed to process personal information that allows identification of the person and describes their profession, such as name, date of birth, education and training, or professional qualifications including reasons for the termination of an employment relationship.[886] Additionally, it may process other data derived from official authorities, trade surveillance agencies, audit firms or supervised entities, such as extracts from registers, official documents, documents from audit firms or supervised entities.[887] Furthermore, the norm contains relatively open formulated clauses that give FINMA broad competences. Accordingly, FINMA can process data: that is nec-

879 Grob/von der Crone, SZW 2017, 857.
880 Graf, GesKR 2019, 385.
881 FSB, Toolkit 2018, 67-68; for the rolling bad apples phenomenon see n 91 of this thesis.
882 FCD 143 I 253 consid. 6.5.2.
883 BBl 2017 7151; Rayroux/Conti, BSK FINMASA 23 n 15; see FCD 143 I 253 consid. 4.8-5.
884 Grob/von der Crone, SZW 2017, 860.
885 See also FINMA, Erläuterungen DatenVO 2023, 7-8 for a comprehensive overview.
886 FINMA-DataO 5 I a, b.
887 FINMA-DataO 5 I c-k.

essary for the selection and fulfilment of the tasks of FINMA's agents; which it receives from legal reporting and disclosure obligations; or also from third parties; as well as other data obtained during the execution of its statutory mandate.[888] Moreover, FINMA-DataO 5 II lists the categories of particularly sensitive personal data (according to FADP) that may be included in the data processed by FINMA. This includes, *inter alia*, data related to religious or political beliefs, as well as data concerning a person's health.[889]

280 Personal data can be gathered through third parties or by FINMA itself.[890] FINMA conducts its own research in publicly or non-publicly accessible sources.[891] Under certain circumstances, particularly in cases of collusion risk, FINMA may acquire data about a person without the person being aware of it, for example, by accessing public user profiles through pseudonymous FINMA accounts.[892]

281 If, as part of this processing of personal data, FINMA becomes aware of potential relevant breaches of supervisory regulations by a person who currently holds an irreproachability guarantee position, it initiates formal proceedings to investigate the matter.[893] The opening of such proceedings must be communicated to the parties in accordance with FINMASA 30.[894]

2.2.3. *Storage in the Irreproachability Guarantee Database*

2.2.3.1. Content of the Database

a. Permissible Data

282 Not all data which FINMA is allowed to processed can also be stored by the supervisory authority. FINMA-DataO 11 holds which data is allowed to be kept in the database. The first part of the list is very similar to the one prescribing which data is generally allowed for the processing by FINMA.[895] However,

888 FINMA-DataO 5 I l-o.

889 FINMA, Erläuterungen DatenVO 2023, 8; which notes that this data is only listed for transparency reasons and the legitimation derives from FADP 5 let. c sec. 1-6.

890 FINMA-DataO 6 I.

891 FINMA-DataO 6 II.

892 FINMA-DataO 6 III; FINMA, Erläuterungen DatenVO 2023, 8-9.

893 Du Pasquier/Rayroux, BSK FINMASA 3 n 13; see n 328 of this thesis for a detailed discussion of the enforcement instruments.

894 FCD 143 I 253 consid. 3.6.

895 Cf. FINMA-DataO 11 let. a-j and FINMA-DataO 5 I.

FINMA-DataO 11 is partly more restrictive: data on the education or profession of an individual may also be stored, but not the reasons for termination of a previous position.[896] In addition, only formal criminal charges or criminal complaints by authorities may be entered into the database, compared to the allowance for collecting general files from criminal or other authorities.[897] The general clauses that hold for data processing are completely absent with regards to the provisions for data storage.[898] Instead, written confessions of misconduct to an authority and self-disclosures can be included in the database, as well as evidence that despite indications of a supervisory breach, no proceedings can be brought against a person because she evades such, or a written declaration of an individual stating the person will (temporarily or indefinitely) refrain from professional activities in the Swiss financial market.[899]

b. Other Data

283 In a leading decision, the Swiss Federal Supreme Court held that the previously elaborated list on which data is allowed to be stored was to be regarded as exhaustive.[900] In said case, data about a former executive (managing director) of the bank UBS was stored based on suspicions and indications from e-mails and other documents FINMA obtained as part of the administrative proceedings against the person's former employer. The individual challenged the entries in the watch list that concerned him personally.[901] The court held that *only substantiated information* about a person in connection with reliable data on their business activities is allowed. This includes information from proceedings

896 Cf. FINMA-DataO 11 let. b and FINMA-DataO 5 I b.

897 Cf. FINMA-DataO 11 let. g and FINMA-DataO 5 I h.

898 Cf. FINMA-DataO 11 and FINMA-DataO 5 I l-o.

899 Cf. FINMA-DataO 5 and FINMA-DataO 11 let. k-m. Further differences between the two regulations include that FINMA-DataO 5 I c allows for the processing of data related to financial and professional situation, assets and insurance, while FINMA-DataO 11 only allows for the registration of data related to assets and insurance. Additionally, according to FINMA-DataO 5 I e, the processing of trade surveillance data is permitted, which is not listed as a type of data in FINMA-DataO 11.

900 FCD 143 I 243, consid. 7.2.2, the decision concerns a previous version of the FINMA-DataO. Previously, FINMA's practice was more extensive and, for example also included indications which were not fully clarified yet, see Zulauf, FINMA Sonderbulletin 2013, 27 et seq. Following the Swiss Federal Supreme Court's decision, FINMA amended the FINMA-DataO and specified which personal data may be entered into the watch list, see Bertschinger, SZW 2017, 844; Grob/von der Crone, SZW 2017, 854.

901 FCD 143 I 243 consid. A.-A.e, for discussions of the decision see also Grob/von der Crone, SZW 2017, 851 et seqq.; Bertschinger, SZW 2017, 843 et seq.; Graf, GesKR 2019, 385; Tanner, Finanzmarktenforcement, 101.

where the concerned individual *was a party* (e.g. criminal, administrative, supervisory or disciplinary proceedings), or from other reliable sources such as register entries or results from correctly conducted internal or external audits and personal evaluations. Unfounded assumptions, accusations or unproven suspicions and other (written or oral) statements that have not been tested in a contradictory or otherwise credible procedure against the concerned individual cannot be stored in the watch list. The legitimacy for a storage of data based solely on suspicions cannot be derived from the competence rule in FINMASA 23, and therefore it was held that no formal legal basis for this kind of data storage exists.[902] Accordingly, the entries of the concerned individual had to be deleted.[903]

284 Consequently, when receiving suspicion indications of this kind (e.g. untested information or accusations from untreated criminal complaints), the only option FINMA has is to initiate proceedings directly, otherwise the data must be deleted. However, initiating proceedings can be difficult as the irreproachability of an individual can only be assessed with respect to a specific position. Hence, if the person in question does not currently hold a position with prerequisites for the irreproachability guarantee, or has a position in close prospect, it cannot be assessed. Yet, failure to initiate proceedings will result in the loss of informational foundations for opening proceedings at a later stage, as FINMA is not allowed to store such information in its database.[904]

2.2.3.2. Consequences for Concerned Individuals

a. Information about the Entry

285 When data about a person is entered into the database, the concerned individual is generally informed by FINMA through a so-called irreproachability guarantee letter (cf. FINMA-DataO 12; hereinafter also: letter).[905] The recipient

902 FCD 143 I 243 consid. 6.5.3, 7.3.

903 FCD 143 I 243 consid. 7.4, where the court found that with the watch list entry violated FINMASA 23 I (in its previous version which, despite a slightly different wording, encompassed the same) in conjunction with FINMA-DataO 11 (previously: FINMA-DataO 3 with no material changes to today's version), along with FCSC 13 II in conjunction with FCSC 36 and FADP 17. The previous decision of the Federal Administrative Court was overturned and FINMA was instructed to delete the data about the complainant in the watch list.

904 Graf, GesKR 2019, 385.

905 Tanner, Finanzmarktenforcement, 102; FINMA, Erläuterungen DatenVO 2023,11; Nobel, § 7 n 179; Kunz, § 3 n 174. Though this instrument was used in practice since the early 1990s without an explicit legal basis, the mandatory information of the affected person

of such a letter therefore is a natural person who was active in the administration or management of a supervised entity, left the position and is accused of potential misconduct.[906]

The letter informs the addressee of subsequent reservations regarding her irreproachable business conduct.[907] In addition, the individual concerned is oriented that an assessment will only take place if the person was to take on an irreproachability guarantee position in the future. A decision on whether the person in question provides a guarantee for irreproachable business conduct is explicitly not made.[908] This is because as previously noted the guarantee of irreproachable business conduct can only examined specifically with regards to a certain position, and it cannot be determined in an abstract manner whether an individual does fulfil the standard under BankA 3 II c.[909] Furthermore, the addressee of the letter is invited to provide an initial statement, and is informed about the possibility to seek a conversation with FINMA.[910] Thus, it can be possible to have the entry in the watch list deleted and the irreproachability guarantee letter withdrawn. In case the person in question intends to assume a relevant position (or to take on a qualified participation), FINMA asks to be contacted.[911] 286

Knowledge of an entry constitutes a necessary prerequisite for potential legal protection the addressee might wish to seek.[912] Yet, the irreproachability guarantee letter is not considered a formal ruling in the sense of APA 5. Consequently, FINMA maintains the position that the rights granted under adminis- 287

was introduced with the amendments to the FINMA-DataO following the leading case FCD 143 I 253. Until then, it was upon FINMA's discretion whether it wanted to inform the affected person or not, see also Beck, n 344; FINMA, Press Release FINMA-DataO. FINMA may defer the notification of the entry in the event of predominant public interests, especially e.g. if the notification to the affected person could jeopardise the purpose of an investigation or examination conducted by FINMA or another authority (such as a criminal authority). Furthermore, a person is not informed if one of the reasons listed in FADP 20 applies, see Tanner, Finanzmarktenforcement, 102.

906 FINMA, Annual Report 2013, 112; Kleiner/Schwob, SK BankA 3 n 247.

907 Tanner, Finanzmarktenforcement, 102; Zulauf, FINMA Sonderbulletin 2013, 29.

908 Zulauf, FINMA Sonderbulletin 2013, 28 et seq.

909 This approach is once more consistent with FINMA's long-standing practice, according to which the guarantee of irreproachable business conduct can only be assessed regarding a specific position, see e.g. Baumgarten/Burckhardt/Roesch, AJP 2006, 171; Zulauf, FINMA Sonderbulletin 2013, 27; as well as n 214–218 of this thesis.

910 Zulauf, FINMA Sonderbulletin 2013, 29.

911 Beck, n 346, with further references.

912 FCD 143 I 253 consid. 4.7.

trative procedural law do not apply.[913] However, the operation of such a database can be classified as an administrative real act (*verwaltungsrechtliche Realakte*). Hence, theoretically a declaratory ruling should be requestable from the competent authority, aimed at determining the unlawfulness of a certain action (cf. APA 25a I c).[914] The assertation of such a declaratory ruling requires the affected person to demonstrate an interest which is worthy of protection (cf. APA 25). Yet, unless the affected person does have a relevant position in close prospect, this interest can be difficult to demonstrate.[915] The hurdle to have access to procedural rights also concerns cases where an affected person (currently not holding an irreproachability guarantee position) seeks to challenge an entry which (potentially) falls outside the legally prescribed limits.[916]

b. "Pending" Legal Effects

288 Consequently, for a person not currently holding a position which requires a guarantee for irreproachable business conduct, being entered into the list does not have immediate legal effects *per se*. Yet, it still might entail significant restrictions for the person concerned. Being included in the watch list can, under certain circumstances, mean an elaborate and lengthy administrative procedure for admission to a future professional practice for the affected person. Potentially, FINMA may already be biased when assessing the person's irreproachability. Accordingly, the person in question can be in a disadvantaged position for continuing or resuming professional activity without ever having undergone a correct or concrete procedure with corresponding party rights.[917] A new employer is unlikely to want to challenge FINMA, especially since assessments of irreproachability guarantees can apparently take around two to

913 Nobel, § 5 n 165, § 7 n 180; Graf, GesKR 2019, 386; Winzeler, BSK BankA 3 n 20; Kleiner/Schwob, SK BankA 3 n 247, this exclusively refers to the conduct letter itself.

914 Rayroux/Conti, BSK FINMASA 23 n 17; similarly, Winzeler, ZSR 2013, 440, in addition, the analogous specific claims according to FADP 25 apply. An *administrative real act* constitutes administrative actions that are not aimed at a legal outcome, but rather a factual one. They do not directly establish rights and obligations for private parties but may have indirect legal effects. Through a *declaratory ruling*, individuals who have a legitimate interest may request a ruling from the competent authority on actions that are based on federal public law and affect rights or obligations. A declaratory ruling does not establish, modify, or revoke any new rights and obligations. Rather, it solely to clarifies the legal situation by authoritatively determining the existence, non-existence, or extent of administrative rights and obligations, see Häfelin/Müller/Uhlmann, n 889, 1408, 1429.

915 Baumgarten/Burckhardt/Roesch, AJP 2006, 175; Winzeler, BSK BankA 3 n 20, see also n 214–218 of this thesis.

916 Rayroux/Conti, BSK FINMASA 23 n 17; see also FCD 143 I 253.

917 FCD 143 I 253 consid. 4.3, 4.6.

three years.[918] Candidates for a position requiring an irreproachability guarantee with an entry in the database may thus not even be considered for that position. Consequently, a listing in the watch list can lead to a *de facto* professional ban or, at least act as a precursor for a possible professional ban or for restrictions on professional activity in the financial market sector.[919] Some consider this practice to be a deliberate circumvention of an administrative procedure for imposing a professional ban.[920] In this context it is worth noting that the data is generally kept for ten years and in exceptional cases up to twenty years (cf. FINMA-DataO 13). With each entry into the database, the period begins anew.[921]

Yet, the listing in the database does not constitute a formal prejudgment. Even in the absence of an entry in the watch list, FINMA will and must verify other information. Furthermore, the guarantee for irreproachable business conduct can also be assessed positively, even if a person is listed in the database. This might be the case if, for example, enough time has passed since the incident or because the concerned person has significantly improved business conduct in the meantime. In case of a positive assessment, the listing in the database will be deleted (cf. FINMA-DataO 13 II).[922] If, however, at the time of the assessment of the person in question a specific irreproachability guarantee position is denied by FINMA, the affected person has the right to an appealable ruling (APA 5) and access to subsequent administrative procedural rights.[923] 289

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918 Nobel, § 5 n 165 et seq.

919 Rayroux/Conti, BSK FINMASA 23 n 12; Nobel, § 5 n 166; Graf, GesKR 2019, 386; Lombardini, Chap. IV n 74; Winzeler, ZSR 2013, 440; see also Hsu/Bahar/Flühmann, BSK FINMASA 33 n 30 with similar references concerning the conduct letter. In an earlier decision, the FAC explicitly stated that such a conduct letter does not constitute a professional ban, as the individual concerned is free to take on any other position and even an irreproachability guarantee position is not prohibited but rather subject to FINMA's approval, such as for any other individual, see FAC decision B-1360/2009 from 11 May 2010 consid. 3.5.1. In a newer decision the FSC held that the watch list constitutes, in the sense of a preliminary stage, the basis for a possible professional ban or at least for restrictions on occupational activity in the financial market sector, see FCD 143 I 253 consid. 4.1. For the professional ban as an enforcement instrument see FINMASA 33 and also n 328 et seqq. of this thesis.

920 Winzeler, BSK BankA 3 n 22; Kleiner/Schwob, SK BankA 3 n 247; Nobel, § 5 n 166; Graf, GesKR 2019, 386.

921 Rayroux/Conti, BSK FINMASA 23 n 18, who also note the exception to listings based on a criminal conviction or a legally binding finding by FINMA regarding the exercise of an activity without the required permit, for which the retention period is twenty years.

922 Tanner, Finanzmarktenforcement, 103; FINMA, Erläuterungsbericht DatenVO 2022, 10; Rayroux/Conti, BSK FINMASA 23 n 18.

923 Zulauf, FINMA Sonderbulletin 2013, 29; Nobel, § 5 n 165, § 7 n 180; FINMA, Annual Report 2013, 112 et seq.

2.3. Changes in Senior Management

2.3.1. *Background and Development*

290 Personnel changes in senior management is an aspect which concerns the continuing business activity of a licensed bank and it therefore falls within the scope of the ongoing supervision. In such a case, the question arises as to how to proceed when a member of the corporate body is replaced given that the irreproachability guarantee in BankA 3 II c is a licensing requirement which has to be continuously adhered to (cf. BankA 3 III, BankO 8a).[924]

291 In the past, personnel changes and consequently the appointment of new irreproachability guarantee holders in senior management of licensed institutions have not been individually assessed and approved by FINMA, and there was no obligation for banks to report on such.[925] Even today, the Banking Act and the Banking Ordinance do not *explicitly* stipulate an re-approval requirement for changes of individuals in the governing bodies. However, the provision BankO 8a (in force since 2019) introduced obligations for banks in case of changes in licensing requirements in *general*. Accordingly, such changes must be reported to FINMA (BankO 8a I), and for changes of significant importance, prior approval from FINMA must be obtained for the continuation of the business activity (BankO 8a II). This also encompasses personnel changes in senior management.[926]

292 In September 2021 FINMA moreover published a "Guideline Concerning Changes in Persons entrusted with the Administration and Management" (hereinafter also: Guideline).[927] The Guideline does not establish legal entitlements or regulatory requirements for the supervised entities. It rather provides assistance by transparently presenting FINMA's practice in dealing with organisational structure changes.[928]

924 BAUER, EF 2021, 611.

925 Cf. KLEINER/SCHWOB, SK BankA 3 n 247; WINZELER, BSK BankA 3 n 19; AELLEN, 220 et seq.

926 REISER, SZW 2022, 548.

927 German title: *Wegleitung betreffend Änderung bei den mit der Verwaltung und Geschäftsführung betrauten Personen* ("*Organmutationen*").

928 FINMA, Wegleitung Organmutationen, 1, where it is also stated that Guidelines (*Wegleitungen*) do not establish legal rights or impose supervisory requirements on those subject to supervision. According to FINMA, Communication Policy, 7, such Guidelines serve as tools for supervised entities with regard to licensing and reporting matters. The herein discussed Guideline concerning changes in persons entrusted with the administration and management mainly recites the existing legal bases, cf. also FINMA, Annual Report 2021, 26, which also states this.

2.3.2. *Current Practice*

Under the current setup, a unilateral notification from the institution to the supervisory authority suffices when a relevant person leaves the bank.[929] If, however, an individual is to take on a position which requires the guarantee for irreproachable business conduct, FINMA must be informed *prior* to the nominated individual assuming the position (cf. BankO 8a).[930] In its assessment of the individual concerned, the authority evaluates the integrity and competence of the nominated person, particularly in light of the composition of the corporate body to which she will belong. Following its assessment, the supervisory authority may approve the candidate, install certain conditions on the individual, or reject the person. While very similar to the initial assessment in the course of an institutional licensing process, changes in senior management individuals in the course of ongoing supervision is procedurally less stringent. Again, a formal approval decision is not issued. The change will however be approved and included in the existing license.[931] 293

929 Bauer, EF 2021, 611.

930 FINMA, Wegleitung Organmutationen, 1, 3; Reiser, SZW 2022, 548.

931 Bauer, EF 2021, 611 et seq.; regarding the authorisation procedure see also n 207 et seqq. of this thesis.

II. Results

294 The second phase of the supervisory law life cycle, ongoing supervision, constitutes one of FINMA's core activities. In its forward-looking prudential supervision the primary focus is on assuring the permanent fulfilment of licensing requirements, including organisational, personnel and financial prerequisites. The analysis of the ongoing supervision of senior management in Swiss banks, in consideration of its interaction with prudential corporate governance, led to the following results.

295 The regulatory audit was identified as one of the main instruments of ongoing financial market supervision. It assesses the institutions' adherence to regulatory requirements. Switzerland employs a dualistic supervisory approach, meaning that not only the supervisory authority but also an external audit firm can conduct the regulatory audit. The latter thereby acts as an extended arm of the supervisory authority. With regard to (G)-SIBs, FINMA often carries out audits itself. Still, this system has faced criticism due to potential conflicts of interest. Auditing firms might lack the incentive for thorough and critical evaluations, given that the board of directors of banks mandate the auditing firms and the institutions directly remunerate them. This has led to calls for increased independence in the audit process. Besides the regulatory audit, FINMA has broad powers to collect and potentially store personal data for ensuring compliance with the irreproachability guarantee of relevant individuals. Beyond these instruments, FINMA apparently employs various less formalised tools such as supplementary audits, supervisory reviews, and ongoing dialogues with institutions to monitor and improve corporate governance and operational effectiveness. As these means are largely undocumented and very scarcely discussed in the academic literature, their subsequent analysis was not possible.

296 Following the previously established dual-perspective strategy for regulating and supervising senior management, the analysis first examined the ongoing supervision of *organisational requirements*. The paramount importance of the ongoing oversight of these and hence corporate governance of supervised entities was highlighted by the supervisory authority. It was shown that, in principle, BankA 3 II a, as well as its supplementing provisions in BankO 11 and the relevant provisions of FINMA-Circ. 17/1 "Corporate Governance – Banks", are part of the regulatory audit. Not only must general organisational prerequisites be audited, but also whether the governing bodies are executing their al-

located responsibilities and tasks. Therefore, it has to be examined if the board of directors installed a suitable organisational structure and set forward the bank's strategy or whether the executive management installed appropriate control mechanisms. Consequently, the previously identified organisational key norms are theoretically subject to ongoing supervision in the course of the regulatory audit. The in-depth look at this tool however revealed that the respective pre-defined audit points are *inherently broad*. Moreover, according to the available documentation it is generally only required that the prescribed points must be assessed, but not *how* such an audit should be conducted. Very few exceptions were identified for the cases where a more in-depth audit is required. Furthermore, these broad audit points are generally reviewed only once every six years in their entirety. The audit field corporate governance at group level constitutes the only exception. It must be reviewed annually, however there is little further detail on what or how this must be audited. It must be highlighted that the evaluated documents only constitute minimal requirements and FINMA may require more specific or deeper audits.

Still, in general, the current setup regarding audits of organisational requirements affords auditors with great discretion and leaves a lot of room for interpretation in applying the guidelines. The absence of a comprehensive examination of senior management as part of the audit of corporate governance was identified as a potential issue by the IMF. The body also voiced concerns regarding insufficient direct connection to the practices for which senior management holds responsibility in light of the breadth of the audits. Accordingly, the current setup raised questions about accountability within corporate bodies and was also seen to undermine their importance. Moreover, it particularly criticised the absence of the instrument of explicit written assessments of senior management's effectiveness as a means of ongoing supervision. More generally and in reference to the dualistic supervisory approach, the IMF stated that it considered the supervision of corporate governance as one of the least well-suited topics to be covered by external auditors. With regard to the ongoing supervision of organisational requirements, it is thereby found that while they constitute an important aspect of the mandatory annual regulatory audit, due to the audits' effective setup and design they seemingly do not provide thorough oversight of senior management. 297

Regarding the ongoing supervision of *personnel requirements* and hence the guarantee of irreproachable business conduct of senior management, the situation was found to be less clear. The supervisory authority stated that it continuously verifies whether these persons meet the subsequent requirements. The analysis was able to identify that *some* aspects of the irreproachability 298

guarantee are assessed in the course of the regulatory audit examining corporate governance. Consequently, mostly their professional competence (fitness) is subject to audit and hence not the individual's irreproachability (propriety). In addition, the competence of the governing bodies and compliance with the irreproachability guarantee must be *confirmed* in the audit report. The supervisory authority moreover stated to evaluate the level of integrity of senior management in meetings or interactions between FINMA and corporate bodies of banks in the course of ongoing supervision. Given that these means are not formalised or documented by the authority, nor elaborated or discussed in the academic literature, there is no possibility to examine these as potential instruments to supervise adherence to the irreproachability guarantee. What has been found in this context however is that recently, significant changes in the senior management of banks require an assessment and new approval by FINMA, something that was not legally foreseen until 2019. Generally, this relicensing follows the same procedure as the initial authorisation process, yet it is presumably less strict.

299 Another aspect of the ongoing supervision which pertains to the monitoring of the irreproachability guarantee is the practice of the supervisory authority regarding the processing and storing of personal data which could be relevant to BankA 3 II c. The analysis revealed that generally FINMA is afforded broad powers in this regard. This is acknowledged as a crucial prerequisite for efficient financial market supervision. In the course of *data processing*, FINMA may come across information which is relevant to the irreproachability guarantee of a person currently holding a senior management position. However, it is not documented whether the supervisory authority systematically, in the sense of an ongoing supervisory instrument, processes relevant data concerning these individuals; or whether it only does so if there are aspects pointing to a violation of the irreproachability guarantee. With the recent specification of its legal basis, the supervisory authority is now explicitly allowed to process data for the purpose of supervision in general, assessing fitness and propriety, and evaluating an individual's conduct while engaged in activities for a supervised entity. If, at any given time, FINMA obtains information which could indicate that an individual no longer fulfils the requirement of the irreproachability guarantee, an enforcement proceeding is opened.

300 While FINMA is empowered to gather a wide array of data, not all of this data can be stored in its database, which is often referred to as the watch list. For example, the circumstances of employment contract termination may be processed but not entered into the watch list. The practice of the *storage* of data is aimed at individuals who are currently *not* holding a relevant senior

management position. In case of a later assessment of the irreproachability guarantee of an individual, the data is considered in the course of the (re-)authorisation process under the assessment of licensing requirements of the institution. Therefore, the aim of this practice is to identify and deter past wrongdoers from taking on a new position and potentially repeating their wrongful behaviour. If data about a person is stored, the individual is informed by FINMA. It will, however, not be immediately assessed whether the data in question is indeed relevant for an irreproachability guarantee position and hence, no formal procedure is launched. Rather, this data remains stored and potentially has implications if a person seeks to take on an irreproachability position. Some thereby consider this practice a suspended professional ban. This approach remains controversial and creates legal uncertainty. At the core of these issues lies the fact that FINMA only specifically assesses whether a person fulfils the guarantee for irreproachable business conduct in relation to a certain position. Consequently, if FINMA obtained such data and the individual concerned does not currently hold a position which requires the irreproachability guarantee, the authority cannot assess whether a person provides the guarantee for irreproachable business conduct. Thereby the analysis, based on the available material, was unable to identify a conclusive (in the sense of systematic and thorough) ongoing supervision of the requirement of the irreproachability guarantee as the key personnel requirement. It was however found that FINMA has the means to continuously collect and potentially store data about concerned individuals. Whether this is used as an instrument to monitor the adherence to BankA 3 II c could not be conclusively clarified.

Overall, the analysis was able to identify several aspects in the oversight of organisational requirements which pertains to the theoretical systematic supervision of senior management. This also includes the relevant provisions of how the governing bodies have to ensure corporate governance in banks, indicating a mutual influence of both. Yet, questions were raised regarding the practical effectiveness of the current setup. With regards to the personnel requirements, while part of the professional competence was identified to be subject to ongoing oversight under the means of organisational supervision, the analysis was unable to identify a systematic oversight of complete adherence to the irreproachability guarantee. 301

III. Emerging Approaches

A. United Kingdom

302 With regards to the British Senior Managers and Certification Regime (SM&CR) it was previously elaborated that banks play a crucial role in the authorisation of key personnel as they are strongly involved in the authorisation process of senior management and certified functions.[932] The underlying principle is that the task and obligation to oversee (and enforce) individual conduct should not be offloaded to regulatory authorities or professional bodies.[933] This emphasis on involving banks is also evident with regards to the ongoing supervision process. The certification of a senior manager, which authorises a person for a position, is granted for a maximum of twelve months and requires a renewal afterwards.[934] Banks are thereby required to review a senior manager's fitness and propriety annually and recertify such individuals, and the same applies for so-called certified persons.[935] In addition, if changes in senior management responsibilities occur, the revised statement of responsibilities must be submitted to the authorities.[936] If at any given time there are any grounds present which indicate that a relevant individual is not fit and proper for her position, the bank must notify the authorities, which could potentially withdraw their approval of the senior manager.[937]

B. The Netherlands

303 As previously elaborated, the Dutch *supervision of behaviour and culture* is mainly focused on ongoing supervision.[938] The so-called *risk assessments*, which constitute the heart of the emerging Dutch supervisory approach, are conducted complementary to other supervisory audits and in close collaboration with the DNB's specialised expert centre and general supervision divi-

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932 See n 105-114, 129 herein for an overview on the UK setup and the rationale of the approach.

933 PCBS UK, Changing Banking for Good 2013, n 108.

934 Allen, BoE Bulletin Q3 2018, 2, 6; FSMA 2000 s 59, 63(2A).

935 Chiu/Wilson, 517; Kokkinis/Miglionico, 242; FSMA 2000 s 63E(5); Rulebook CRR Firms, Fitness and Propriety, n 4.3-4.5 for the recertification of certified individuals.

936 Kokkinis/Miglionico, 241; FSMA 2000 s 62A.

937 Kokkinis/Miglionico, 242; FSMA 2000 s 63(1A).

938 For an overview on the Dutch setup and the rationale of the approach see n 122-134 herein.

sion.[939] Such assessments are not conducted regularly (e.g. annually) but rather for example, if during the traditional regular supervision observations are made which give rise to concerns about behaviour or culture, or if (financial) results or supervisory problems point to subsequent issues in an organisation.[940] Aligned with the behaviour and culture model, the DNB focuses on risks along the topics of behaviour in decision-making, leadership, and communication, as well as those associated with group dynamics.[941] Moreover, the authority undertakes thematic reviews on behaviour and culture, which are focused on one specific theme (e.g. leadership or decision-making) becoming subject to further examination in numerous supervised entities for approximately one year.[942] In the roughly first ten years of the novel supervisory approach, around 100 assessments were conducted.[943] The majority of the assessments addressed senior management of the institution, where mainly the executive management remains the focal point and, in some cases, also supervisory boards.[944]

The *risk assessment* consists of different phases. It commences with a context analysis, followed by risk identification, risk assessment and, finally, risk mitigation.[945] The initial *context analysis* begins with desk research, which is done in consultation with regular ongoing supervision and where DNB develops a central focus or question concerning decision-making, leadership, communication or group dynamics.[946] The authority then selects one strategic decision-making process which it assesses in detail. This enables the authority to tap into underlying behavioural patterns, group dynamics and mindsets, which are usually harder to see. In its assessment, it is examined how individual and collective behavioural patterns are related to financial and non-financial risks which pose a threat to financial solidity and the integrity of an institution.[947] 304

During the *risk identification* phase, DNB seeks to uncover risks which are related to (probable) negative outcomes for the institution. It is characterised by the personal exchanges between the authority and the institution, as DNB 305

939 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.30.
940 Raaijmakers, DNB Supervision of Behaviour and Culture, 17.
941 Raaijmakers, DNB Supervision of Behaviour and Culture, 52 et seq.; see also n 128 of this thesis for an overview on the model.
942 Raaijmakers, DNB Supervision of Behaviour and Culture, 17; Khan, IMF Working Paper 2018, 32.
943 Nuijts, Governance of Financial Institutions, Chap. 17 n 17.27.
944 Raaijmakers, DNB Supervision of Behaviour and Culture, 19.
945 Raaijmakers, DNB Supervision of Behaviour and Culture, 73.
946 Raaijmakers, DNB Supervision of Behaviour and Culture, 75.
947 Raaijmakers, DNB Supervision of Behaviour and Culture, 76.

conducts inspections on-site and is in close dialogue with senior management of the institution. The authority applies different methods, such as desk research, self-assessments of senior management, employee surveys, interviews or board observations.[948] For example, in this phase, DNB might attend a board meeting and focus on how the meeting is held. It observes verbal behaviour, the amount of time an individual speaks up, the impact of comments made as well as non-verbal behaviour such as facial expressions, posture or listening behaviour.[949] More specifically, the authority reported on a board meeting inspection where it observed dynamics that suggested interpersonal tensions. The CEO and CFO exchanged whispers and non-verbal cues, while other members exhibited disengaged behaviours such as staring at the ceiling and looking out the window. For the DNB, these observations indicated a lack of trust and a sense of obligation among board members, leading to an overall atmosphere of distrust as confirmed by post-meeting admissions from all board members.[950]

306 In the next phase, the *risk assessment*, the nature and the extent of the identified risks is assessed. This is mainly an authority-internal process, where DNB evaluates its data and internally challenges its findings. Risks are then categorised and the intervention or control strategy for the institution is set forth.[951] Finally, in *risk mitigation*, the authority aims to achieve effective and sustainable changes in behaviour, group dynamics and mindset. These interventions are again targeted at the senior management of an institution.[952] The level of intrusiveness of the supervision depends on the seriousness of the identified risks.[953]

307 As an overall finding from these risk assessments, a retrospective analysis of the initial five years of this supervisory approach (2010-2015) revealed a general lack of attention and awareness among governing bodies regarding their own behaviour and the influencing dynamics within their groups. More than half of the assessed bodies exhibited significant issues related to board culture. Typical risks were identified in these assessments, including dominant CEO leadership, resistance to constructive dissenting opinions, inadequate adherence to strategic objectives leading to risky decisions and financial

948 Raaijmakers, DNB Supervision of Behaviour and Culture, 77-83; see also Khan, IMF Working Paper 2018, 32.
949 Raaijmakers, DNB Supervision of Behaviour and Culture, 82 et seq.
950 Raaijmakers, DNB Supervision of Behaviour and Culture, 50, 82 et seq.
951 Raaijmakers, DNB Supervision of Behaviour and Culture, 84-87.
952 Raaijmakers, DNB Supervision of Behaviour and Culture, 88.
953 Raaijmakers, DNB Supervision of Behaviour and Culture, 91 et seq.

losses, and informal decision-making undermining the formal organisational structure. These findings underscore the importance for this kind of supervision.[954]

[954] RAAIJMAKERS, DNB Supervision of Behaviour and Culture, 19.

Part 4: Enforcement

In the previous parts, requirements and authorisation and ongoing supervision, it was elaborated which rules pertain to the senior management of banks and how their continuous adherence is monitored. Enforcement constitutes the next potential phase of the supervisory law life cycle. This part explores the supervisory possibilities to confront senior management for infringements of the previously identified relevant requirements. Different than in the preceding phases, enforcement sets forward instruments which explicitly target individuals. Thereby this analysis commences from a personal perspective and then proceeds to examine potential measures under the organisational perspective. It follows a presentation of the results of the analysis of the Swiss setup, before respective emerging approaches from the model jurisdictions are outlined.

I. Analysis

A. Enforcement as an Element of the Supervisory Law Life Cycle

1. Conceptual Definition

308 While the preceding phases of authorisation and supervision constitute the natural course of the supervisory law cycle and are therefore inevitable, enforcement is only initiated in the case of a potential or actual violation of financial market law.[955] Within the realm of financial market law, there exist subsequent specific tools which are generally discussed under the term *enforcement*. While not explicitly defined in Swiss legislation, this English terminology has been established in (court) practice and the academic discourse. Financial market enforcement encompasses all authoritative actions undertaken by FINMA, aimed at identifying, rectifying, and potentially penalising violations because of breaches of financial market laws.[956] With regards to the *supervised sector* and the subsequent prudential rules applicable to them, license holders are primarily bearers of financial market law obligations and are consequently the main addressees of enforcement procedures given the principle of institutional supervision (FINMASA 3 let. a). However, senior management of the license holders or employees of supervised entities can also be directly addressed.[957] Since 2014, FINMA increased its separate proceedings against employees of supervised entities in general.[958]

309 The enforcement activity in the supervised sector discussed hereinafter is thus to be distinguished from FINMA's competence to take action against so-

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955 NIGGLI/MÄDER, Jusletter 2016, n 28; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 1. See also n 207 et seq. of this thesis for an overview on the authorisation phase, as well as n 243-245 for an overview on ongoing supervision.

956 ZULAUF, Finanzmarktenforcement, 15, 20-23.

957 DU PASQUIER/RAYROUX, BSK FINMASA 3 n 12; NOBEL, § 5 n 221; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 2; FINMA, Enforcement Policy, 2; cf. also instead of many FCD 142 II 243 consid. 2.2. For a definition of senior management in the herein context see n 64-66 of this thesis.

958 FINMA, Annual Report 2014, 74, where it is also noted that in said year the revised enforcement policy was launched, which is now explicitly foreseeing individuals as addressees of enforcement procedures, cf. FINMA, Enforcement Policy, 2.

called *unauthorised financial services providers* and hence financial market participants who, by the nature of their activities, should technically have a license but do not possess one.[959] Moreover, it must be differentiated from enforcement activity in further fields such as *conduct supervision*, as well as *market supervision*, for which FINMA has been authorised since 2013. The supervisory authority can subsequently initiate proceedings against participants (natural and legal persons) in the Swiss securities market suspected of engaging in illegal market activities, such as in cases of insider trading (cf. FinMIA 142) or market manipulation (cf. FinMIA 143).[960]

2. Function and Objective

Traditionally, financial market supervisory law has intended to achieve its protective goals (cf. FINMASA 4) through its preventive effect.[961] Yet, it is also recognised that it is not possible to effectively realise the supervisory objectives solely by means of ongoing analysis- and consensus-based supervisory activity. When deficiencies are identified, it is essential to have access to instruments of administrative coercion.[962] Thereby, enforcement is applied by FINMA as a visible means of acting against breaches of supervisory law.[963] Its aim is to address deficiencies, restore legal compliance, and serve as a deterrent by imposing subsequent measures. Through focused interventions in response to serious transgressions of supervisory law, adherence to regulatory requirements is fostered.[964] Imposed measures can be very impactful for those affected and some instruments (e.g. professional bans or confiscation) show punitive characteristics. Nevertheless, they also serve a preventive purpose, particularly through deterrence achieved by repression.[965] 310

Consequently, enforcement vests FINMA with specifically designed measures to take both preventive and punitive action to ensure the functionality of the financial market and the protection of creditors (cf. FINMASA 31).[966] These in- 311

959 NOBEL, § 5 n 221.

960 ZULAUF, Finanzmarktenforcement, 20-24. Regarding market supervision see KUHN, Finanzmarktenforcement, 399; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 82; cf. FSC decision 2C_315/2020 from 7 October 2020 consid. 4.3.1; see also n 244 of this thesis.

961 NIGGLI/MÄDER, Jusletter 2016, n 29.

962 FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 1.

963 FINMA, Annual Report 2016, 74

964 FINMA, Enforcement Policy, 2.

965 NIGGLI/MÄDER, Jusletter 2016, n 29; NOBEL, § 5 n 222.

966 BBl 2006 2849; FINMA, Enforcement Policy, 2.

struments under FINMASA and the financial market laws complement the administrative procedure under the Administrative Procedure Act (APA), *inter alia*, by establishing specific instruments available to the supervisory authority.[967] FINMA's enforcement proceedings are conducted in accordance with the principles of administrative procedures (cf. FINMASA 53), and thereby must observe the subsequent procedural guarantees (cf. APA 10, 26-33a). Moreover, the supervisory authority's actions are bound to observe constitutional principles. Consequently, FINMA issues rulings (*Verfügungen*, cf. APA 5) in application of FINMASA and further financial market laws, which are generally subject to appeal to the Federal Administrative Court (FAC) and subsequently to the Federal Supreme Court (FSC).[968]

3. Overview on Instruments

3.1. Current Setup

312 As in previous phases, in the course of enforcement the *dual-perspective strategy* for senior management regulation is identifiable. However, in this phase there exist instruments which explicitly and directly target senior management as natural persons, in the sense that they address people in management positions.[969] This applies to the *prohibition from practising a profession* (FINMASA 33) and the *confiscation* (FINMASA 35).[970] Individuals who no longer provide the guarantee for irreproachable business conduct can also be subjects of an *irreproachability procedure*.[971]

967 KUHN/ZULAUF, Finanzmarktenforcement, 36.

968 ZULAUF, Finanzmarktenforcement, 16; WYSS/ZULAUF, Finanzmarktenforcement, 33 et seq.; ROESLER/WALTER, CapLaw 2023, 14, 16; NOBEL, § 5 n 230, 235. Exceptions constitute the rulings regarding foreign administrative assistance and take-over matters, see latter source for details.

969 For the dual-perspective strategy n 148 herein and for a definition of senior management n 64-66.

970 ROESLER/WALTER, CapLaw 2023, 14. Additionally, the instrument prohibition from performing an activity is foreseen in FINMASA 33a, which targets employees of a supervised entity trading financial instruments or client advisers who can be temporarily or permanently prohibited from such activities; possibly also in combination with a professional ban (or other instruments). Given that the instrument does not specifically address individuals in management positions and is not connected to the material scope of the present analysis, this instrument will not be further examined, instead e.g. see KUHN, Finanzmarktenforcement, 383 et seq. for a detailed discussion of the instrument.

971 BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 173

Furthermore, the governing bodies are often affected by measures taken against the institution: for example as part of *restoration of compliance with the law* (FINMASA 31), measures such as organisational restructuring or changes in the composition of bodies can be ordered.[972] In addition, they might be addressed by a less intrusive issuance of a *declaratory ruling and substitute performance* (FINMASA 32).[973] Moreover, there are instruments like the *publication of the supervisory ruling* (FINMASA 34) and the *revocation of a license* (FINMASA 37 in connection with BankA 23^{quinquies}). However, the instrument of publishing the supervisory ruling has primarily been used in cases of prohibitions against natural persons who engage in unauthorised financial market activities, and the withdrawal of the license has the inevitable consequence of the liquidation of the institution.[974] Therefore, in their current setup and practice, they are of limited relevance for the present context. 313

3.2. The Question of Fines

Unlike most foreign financial market supervisory authorities, FINMA does not have the competence to impose fines.[975] Vesting the supervisory authority with such an instrument has been the subject of controversy in various reports and political debates in the past, but so far, it has not been adopted.[976] The Swiss financial market supervisors' lack of power in this regard has also been noted internationally. The IMF raised the question of whether the current setup provides for sufficiently dissuasive instruments and suggested to further explore the possibility of administrative fines.[977] 314

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972 Wyss, Enforcement Instrumente, 126.

973 Roesler/Walter, CapLaw 2023, 17; see also FAC decision B-1360/2009 from 11 May 2010 consid. 4.2.

974 Wyss, Enforcement Instrumente, 129, 132; FINMA, Communication Policy, 10; Kuhn, Finanzmarktenforcement, 386; Nobel, § 5 n 169; Hsu/Bahar/Flühmann, BSK FINMASA 34 n 12a, 22; Kuhn/Wyss, Finanzmarktenforcement, 411; Poledna/Jermini, BSK BankA 23^{quinquies} n 13; Roth Pellanda/Kopp, BSK FINMASA 37 n 24.

975 Kunz, § 3 n 189; Wyss, Enforcement Instrumente, 136; Roesler/Walter, CapLaw 2023, 14; Niggli/Mäder, Jusletter 2016, n 29; Nobel, § 5 n 222; Expertengruppe Bankenstabilität, Report 2023, 58. For the United Kingdom and the Netherlands, which both established the power to impose fines see n 417, 418, 421 of this thesis.

976 Cf. Benninger/Zulauf, Finanzmarktenforcement, 466-475; Nobel, § 5 n 243-249 for a thorough overview on the discussion including further references.

977 IMF, Switzerland Country Report 2014 no. 14/143, n 65; see also Benninger/Zulauf, Finanzmarktenforcement, 472 with further references; also Wyss, Enforcement Instrumente, 137-138, which discusses the external effects of the lack of authority to levy fines.

315 The core element of the controversies in Switzerland lies in the tension between administrative and criminal proceedings. Participants in a FINMA procedure under administrative law are generally legally obligated to cooperate in establishing the facts (cf. APA 13) and supervised entities must provide all information and documents that FINMA requires to fulfil its duties (cf. FINMASA 29). As it has been consistently argued that the monetary fines have a penal character and are therefore subsequent to criminal proceedings, these principles of administrative law are seen to be in conflict with those of criminal law, as the latter provides the principle of *nemo tenetur se ipsum accusare* meaning that no one is obligated to testify against oneself. Moreover, in criminal proceedings, the presumption of innocence applies, and evaluation by an independent judge is mandatory.[978]

316 However, recently the Federal Council concluded in a report that pecuniary administrative sanctions, in general, can be incorporated into the system of administrative sanctions. Only specific issues require potential clarifications at legislative level in the respective act or in the APA in general. The applicable framework would be administrative procedural law, supplemented with overarching criminal procedural safeguards. Solutions for addressing the tension between the duty to cooperate and the privilege against self-incrimination have also been proposed. Consequently, with a few adjustments, the introduction of fines as an enforcement instrument by FINMA on supervised *institutions* would currently seem feasible. Whether the same applies to *individuals* is left open.[979]

317 Giving FINMA the power to impose fines has also resurfaced in recent political discourse. While the discussion was already launched before the emergency takeover of Credit Suisse by UBS, after this occurrence the evaluation on introducing a fine competency was integrated into the review of the regulatory too big to fail framework regarding systemically relevant banks (cf. BankA 52), which is expected to be published in spring 2024.[980] The implementation of

978 NOBEL, § 5 n 247, 247; ZULAUF, Finanzmarktenforcement, 423, 427; ROESLER/WALTER, CapLaw 2023, 19.

979 BENNINGER/ZULAUF, Finanzmarktenforcement, 474 et seq., with reference to BBl 2022 776 83 et seqq., 181 et seqq. Pecuniary administrative sanctions are considered repressive because they not only aim to restore the lawful state but, in particular, prevent an unlawful state from recurring. They thus also have a preventive effect by deterring those affected from violating their obligations, see HÄFELIN/MÜLLER/UHLMANN, n 1444-1445a.

980 Cf. Postulate 21.4628 from Birrer-Heimo Priska in the National Council from 17.12.2021, including the respective statement from the Federal Council from 16.2.2022 where it was explicitly requested that the Federal Council examined and reported on how FINMA can be enabled to impose fines and/or further sanctions on financial institutions and respon-

fines against *financial institutions* as a possible enforcement instrument was also proposed as a potential future means for further review to enhance FINMA's supervisory capabilities by the expert group on banking stability. It however not addressed a such instrument against individuals, as it considers that an uncooperative management would react to such monetary penalties imposed against the institution.[981] It was also in the context of this takeover, that FINMA openly expressed its desire to have the ability to impose administrative fines. While recognising that they do not constitute a universal remedy, the supervisory authority views them as a significant deterrent capable of sending a crucial signal.[982] With regards to imposing fines on *institutions* in the financial sector, two major points of criticism, also from an economic perspective, should be remembered: the questions on the effectiveness of fines in the financial sector in general and the fact that ultimately, fines are paid by shareholders.[983]

sible individuals. In response the Federal Council at first, inter alia, referred and linked the postulate to a previous postulate (21.3893, see following), suggesting that the possible implementation of pecuniary administrative sanctions is evaluated the report responding to the previous postulate. In discussion of the emergency takeover the National Council then accepted the postulate on 2.5.2023. Previously, postulate 21.3893 from Andrey Gerhard in the National Council from 18.6.2021 (incl. the respective statement of the Federal Council from 25 August 2021), more generally requested to evaluate the existing enforcement instruments and the need for potential expansion with regards to senior management of financial institutions and also referenced the UK approach. In response, the Federal Council commissioned the preparation of a report in which the existing instruments are analysed with regard to their effectiveness, including whether a stronger individual assumption of responsibility can be achieved either at the level of FINMA or through new legislative rules. See also e.g. interpellation 23.3417 from Glättli Balthasar from 17.3.2023 (including the respective statement from the Federal Council from 24.5.2023), according to which the handling of the postulates is integrated into the review of the too big to fail framework (cf. also BankA 52). The report remains pending at the time of writing.

981 Expertengruppe Bankenstabilität, Report 2023, 58, 65, 81. See also fn 376 and n 6 of this thesis for a further discussion of the report.

982 Amstad, FINMA Address 2023, 5; FINMA, Report CS Crisis 2023, 49.

983 See n 75 et seq., 90 et seq. herein. From a Swiss perspective see Benninger/Zulauf, Finanzmarktenforcement, 472 et seq., who share a similar view; also, Nobel, FS von der Crone, 639, who sees an issue in the fact shareholders ultimately bear the consequences of fines imposed on the institutions; similarly Bertschinger, SZW 2023, 727 who furthermore notes that a fine against an institution cannot remedy the misconduct of a person due to internal responsibility diffusion.

4. Limits on Communication in Enforcement

318 Generally speaking, FINMA's actions attract significant public interest, and especially its enforcement activities are under scrutiny.[984] The supervisory authority's approach to communication is confronted with diverse societal expectations. On one hand, there is a public interest in obtaining information about individual financial market participants, whilst on the other hand, the authority is bound to official secrecy (cf. FINMASA 14) and must safeguard legitimate private interests such as preserving business or professional confidentiality as well as the personal rights of affected institutions and individuals.[985]

319 The legal framework for FINMA's communication activities is outlined in FINMASA 22. It sets forth the basic principle according to which FINMA generally is not allowed to disclose information about specific enforcement cases.[986] Exceptions constitute cases where the supervisory authority needs to publicly explain why and how it is investigating cases of misconduct.[987] This serves specific supervisory interests, including the protection of market participants and supervised entities; correcting false or misleading information; and preserving the reputation of the Swiss financial market. Information can be withheld upon request from the concerned party, and FINMA must respect the personal rights of those involved.[988] In addition, FINMA communicates on enforcement proceedings when there is a particular need to do so from a supervisory viewpoint.[989] Publication of information is required when investors, creditors or further market participants necessitate immediate protection or when misleading information with a potential damage to investors or supervised institutions need to be corrected.[990] Furthermore, FINMA has issued guidelines in which it outlines its communication strategy and describes various communication channels, the so-called "Communication Policy".[991]

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984 Zulauf/Wyss, Finanzmarktenforcement, 483.

985 Nobel, § 5 n 83; cf. also FINMA, Communication Policy, 3, 9.

986 Zulauf/Wyss, Finanzmarktenforcement, 483; cf. also FINMASA 22 II.

987 BBl 2006 2875.

988 Zulauf/Wyss, Finanzmarktenforcement, 483; Zufferey/Contratto, 130; cf. FINMASA 22 II.

989 Cf. FINMASA 22 III, IV.

990 FINMA, Communication Policy, 9 et seq. This communication activity must be distinguished from the publication of a supervisory ruling as an enforcement instrument (cf. FINMASA 34), see BBl 2006 2875; Zufferey/Contratto, 130 et seq. For a discussion of the instrument see n 397-401 of this thesis.

991 Nobel, § 5 n 83; cf. FINMA, Communication Policy, 3.

Moreover, the supervisory authority is required to report on its enforcement activities and practices at least once per year, yet a systematic and continuous communication on proceedings is not possible under FINMASA 22.[992] Still, there are various means by which the authority communicates in this regard. Press releases or FINMA investigations (or findings) reports in certain large-scale cases are used to provide general information on enforcement cases. While press releases are published regularly, the last investigations report was published in 2014.[993] In addition, in FINMA's annual report, the supervisory authority briefly summarises its enforcement activities, however its informational content has diminished in recent years. Between 2015 and 2019, specific annual enforcement reports were published, detailing completed cases, including their outcome in potential appellate proceedings, accompanied by statistical data providing the number of investigations and proceedings. Since 2020 this reporting has been substituted by various loose forms of information on FINMA's website in a database-like format.[994] In addition, in the past, the supervisory authority has provided anonymised case practices in so-called bulletins, the last one being published in 2017. Finally, FINMA can publish rulings, although this is rare and primarily serves to inform market participants in the context of takeovers.[995] 320

These elaborations indicate a trend of increasing restraint in FINMA's publication practices, resulting in reduced transparency over recent years. This is opposed to FINMA's commitment to maximise transparency about its activities.[996] With the current practice, the general case descriptions seldom provide detailed considerations from which (affected) legal or natural persons can derive standards for their own conduct. The current setup makes it challenging for supervised entities to comprehend both the practice and the supervisory expectations directed at them. This is particularly problematic since FINMA-Circulars are increasingly principle-based (cf. FINMASA 7 II), as also ev- 321

992 FINMA, Communication Policy, 3, 9.

993 FINMA, Communication Policy, 1; Wyss/Zulauf, Finanzmarktenforcement, 498; Abegglen/Schaub, SZW 2020, 574.

994 Wyss/Zulauf, Finanzmarktenforcement, 499; Abegglen/Schaub, SZW 2020, 574. The current setup also includes an annual report which consolidates the cases of each year (*Enforcement Kasuistik*), which aims to provide public insight into addressed issues and whether cases were appealed, including their outcomes. Raw statistical data is available in separate lists.

995 Wyss/Zulauf, Finanzmarktenforcement, 498 et seq.

996 Abegglen/Schaub, SZW 2020, 574, 576, with reference to FINMA, Strategic Goals, 3, 17; Wyss/Zulauf, Finanzmarktenforcement, 498, 500. See also Kunz, § 3 n 185, who does not directly address this development but calls for the strong confidentiality maintained by FINMA to be reviewed and partially revised.

ident in the development of FINMA-Circ. 17/1. This development would in turn require specification by practice.[997] In 2023, referring to the emergency takeover of Credit Suisse by UBS, FINMA conveyed that it would appreciate the possibility to communicate more transparently and actively about its supervisory activities in general, but also more specifically with regards to completed enforcement actions.[998] Also, in this context, the expert group on banking stability highlighted the concern that under the current setup, the broader public might not be adequately informed about the bank's unstable state, as FINMA is not permitted to disclose such information.[999] Besides apparently being in the supervisory authority's interest, a more comprehensive communication practice regarding enforcement matters would facilitate a well-informed academic discourse on this subject and, most importantly, enhance transparency for affected individuals and institutions.[1000] Lastly, it is worth mentioning that FINMA in general is excluded from the personal scope of application of the Federal Act on Freedom of Information in the Administration. Thereby, there is no possibility to access official documents through this avenue.[1001]

5. Context and Scope of Analysis

322 The present part concerning enforcement is different from the previous phases of the supervisory law life cycle. It constitutes the only phase where in some measures, the individual is directly addressed by supervisory law, as previously elaborated.[1002] The instruments which directly refer to individuals are discussed under the personal perspective in the following. Moreover, there are instruments which, according to the normative text, do not target these individuals, but can still have an impact on them.[1003] Rather, they (either explicitly or implicitly) address the supervised entities (or persons) according to the

997 Abegglen/Schaub, SZW 2020, 574 et seq.; for the development of the FINMA-Circ. 17/1 see n 171-179 of this thesis, where this evolution can clearly be observed, especially with regard to the provisions of the board of directors and the executive management.

998 Amstad, FINMA Address 2023, 5; FINMA, Report CS Crisis 2023, 49.

999 Expertengruppe Bankenstabilität, Report 2023, 58. See also fn 376 and n 6 of this thesis for a further discussion of the report.

1000 Cf. also Kunz, § 3 n 185 who in fn 553 calls for, e.g. rulings or reports to be made accessible to scientific research (analogous to the practice of access to the confidential protocols of preliminary meetings of the National Council and Council of States).

1001 Cf. FoIA 2 II.

1002 Cf. n 312.

1003 Cf. n 313.

general scope of application of FINMASA (cf. FINMASA 3 let. a).[1004] For the use of the present study, their imposition on the bank as a supervised entity is relevant. Accordingly, these instruments are discussed under the organisational perspective.

Moreover, it is the phase where the focus shifts from how the institutional requirements shape senior management regulation and supervision to how these individuals are held accountable for deficiencies in relevant organisational and / or personnel requirements. Consequently, within the research scope of the present work, the ensuing analysis examines enforcement in a very specific context. It assesses how senior management can be subject to such proceedings for breaches of BankA 3 II a and c. As established earlier, an organisational setup is installed through BankA 3 II a, whereas BankA 3 II c sets forth personnel requirements. Together with the respective accompanying provisions, these norms install a regulatory setup on and allocate duties to the senior management.[1005] 323

In this context it is also worth highlighting FINMA's statement, according to which most enforcement cases originate from deficient leadership and control processes.[1006] While as previously elaborated, the supervised entity remains the primary point of reference in enforcement, it is not only the banks', but also its corporate bodies' responsibility to ensure that supervisory law is adhered to.[1007] Additionally, FINMA has stated that when it cannot specify a concrete breach of supervisory provisions, it focuses on the institution's organisational arrangements and, by extension, whether the company's corporate governance could be improved. Regarding potentially involved employees, FINMA must decide, based on the available instruments, whether it takes action against them.[1008] These viewpoints are of importance for the present study. 324

In addition to presenting the applicable substantive law, the ensuing analysis has its focal point on the practical application of the instruments in the present context. The corresponding research was conducted along the following 325

1004 Cf. n 308 for the subjects of enforcement instruments in FINMASA and their applicability to the herein discussed senior management.

1005 See n 147-151 herein for an overview of these requirements, as well as n 183-191 for a discussion of the organisational and n 192-205 for the personnel requirements.

1006 Branson, FINMA Corporate Governance 2015, 2.

1007 FAC decision B-3092/2016 from 25 April 2018 consid. 3.4.6.2; see also n 312 of this thesis.

1008 FINMA, Annual Report 2016, 74. For an explanation of corporate governance in a general manner see n 20-26, 30-35 and specifically for banks see n 36-50.

parameters: *information bases* constitute the publicly available information from FINMA regarding its enforcement activities. It includes press releases, annual reports, enforcement reports, bulletins, case reports from the database; but also decisions from the Federal Administrative Court and the Federal Supreme Court; and potential academic discussions of specific cases.[1009] The focus is primarily (but not exclusively) on *more recent cases*, especially those from 2017, as it was then that the revised FINMA-Circ. 17/1 "Corporate Governance – Banks" came into force. As previously elaborated, the latest revision of the Circular led to a significant overhaul of the provisions and most importantly departed from the comply or explain principle.[1010] Cases are reviewed where the supervisory violation occurred in a *bank* (regardless of its size) and where a *higher-ranking employee* (not necessarily limited to senior management per se) was *involved in the breach and/or directly affected* by a measure. A more precise delineation was not possible, given the broad formulations in enforcement publications. The absence of comprehensive or detailed enforcement communication constitutes a general constraint in the ensuing analysis. For instance, FINMA often points out deficiencies in the organisation or risk management when imposing measures. However, the authority's detailed argumentation, the specific nature of these shortcomings or what the authority would expect instead is mostly not communicated.[1011]

326 Along the precedingly elaborated parameters, cases were identified and reviewed, in which violations of BankA 3 II a and c were brought forward. However, only in a few of them was the higher-ranking management recognisably targeted by proceedings in the context of the subject researched here. These identified cases are built into the ensuing analysis of the enforcement instruments, with the goal to gain an insight into FINMA's enforcement practice in the present context.

327 The ensuing analysis does not generally include procedural and process-related aspects; only if such are deemed relevant in the present context.[1012] It also solely focuses on financial market law and its enforcement by FINMA. Nevertheless it is worth noting that the same occurrence which gives rise to enforcement proceedings potentially also triggers further procedures, such as

1009 See also n 318-321 herein for an overview of the different forms of communication in enforcement cases.

1010 Regarding this development see also n 173 herein, as well as fn 327 for a brief description of the comply or explain principle.

1011 Abegglen/Schaub, SZW 2020, 574.

1012 See e.g. Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 6-71 for a detailed discussion of the enforcement procedure.

criminal or civil law proceedings, which are conducted parallelly or consecutively.[1013] For example, an irreproachability guarantee procedure might give rise to a procedure under labour law.[1014] Moreover, organisational deficiencies may also be criminally relevant and correspondingly prosecuted.[1015] From a criminal law viewpoint, deficiencies in bank organisations are especially discussed in cases of violations of anti-money laundering provisions.[1016] Also not in scope of the present work are the criminal and liability provisions enforced by the Federal Department of Finance (FDF) in BankA 38 et seqq., and thereby also the liability provision in BankA 39. The latter today directly refers to company law (CO 752-760) and is excluded from the analysis as it constitutes a civil proceeding.[1017]

B. Instruments Affecting Senior Management

1. Personal Perspective

1.1. Prohibition from Practising a Profession

1.1.1. *Content and Function*

328 The first instrument analysed from the personal perspective is prohibition from practising a profession (so-called professional ban, *Berufsverbot*). According to FINMASA 33, the supervisory authority can prohibit individuals responsible for a serious violation of supervisory provisions from acting in a management capacity at a supervised institution for a maximum period of five years.[1018] This instrument aims to pre-emptively prevent the situation in which a person who has committed a serious violation of supervisory regulations

1013 BECK, n 1 et seq.

1014 ZULAUF, Finanzmarktenforcement, 31.

1015 See NOBEL, § 5 n 250 et seqq.; see also STRASSER, Finanzmarktaufsicht, § 17 n 108 et seq. who briefly outlines the criminal liability of managers for failures of an institution's organisation.

1016 See JEAN-RICHARD-DIT-BRESSEL, SZW 2022, 574-585.

1017 NOBEL, FS von der Crone, 639; NOBEL, § 5 n 248; see also EMMENEGGER, Bankorganisationsrecht, 223-257 for a thorough discussion of the delimitation between the BankA provision and company law (though based on old law, however the effect is considered the same); for an overview see also n 150 of this thesis.

1018 HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 1. For a delimitation to the professional ban under criminal law see e.g. BBl 2006 2882; ZUFFEREY/CONTRATTO, 138; GRAF, GesKR 2019, 372 et seqq.

holds a relevant leading position for the duration of the ban.[1019] On average, FINMA has imposed the instrument five times per year for the whole financial sector since 2014.[1020] The supervisory provisions which the instrument seeks to safeguard usually apply to the supervised institution rather than the natural person affected by the measure. Therefore, proceedings against such individuals are often a result of a preceding enforcement procedure against a supervised entity, which indicated potential individual misbehaviour.[1021]

329 Imposing a professional ban represents a significant infringement on the constitutional right to economic freedom under FCSC 27 and 94 I.[1022] For such an intervention to be justified, it must meet the requirements of FCSC 36. In light of the principle of proportionality it especially must be assessed whether a less intrusive measure would also be sufficient, such as a bank-internal replacement of a person or the issuance of a declaratory ruling according to FINMASA 32.[1023]

330 The introduction of the professional ban in 2009 (in the course of the establishment of FINMASA) was a novelty in Swiss financial market law, given its explicit focus on individuals in a field of institutional supervision. Though FINMA's predecessor authority, the Federal Banking Commission (FBC), established a practice of irreproachability procedures, which had similar effects (despite a lack of formal authority), the professional ban codified in FINMA's authority directly addresses individuals.[1024] In reference to the practice of the irreproachability procedures the corresponding Federal Gazette found that

1019 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 6.

1020 Cf. the table "FINMA Rohdaten Verfügungen in Endverfahren per 2020", accessible online.

1021 Kuhn, Finanzmarktenforcement, 375; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 96; FCD 142 II 243 consid. 2.3; FSC decision 2C_771/2019 from 14 September 2020 consid. 16.1.

1022 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 11; Zufferey/Contratto, 141, FCD 142 II 243 consid. 3.4; FAC decision B-4757/2017 from 27 February 2020 consid. 15.3.5; see FAC decision B-688/2016 (2018 IV/5) from 11 June 2018 consid. 3.3.

1023 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 11; Zufferey/Contratto, 140-143; FAC decision B-3625/2014 from 6 October 2015 consid. 6.3.2, 9.1.2, see also the latter decision for consid. 9.2. for an explanation of the fulfilment of the principle of legality with regards to FINMASA 33, see also fn 708 of this thesis. For the principle of proportionality see fn 795 of this thesis, for the instrument of FINMASA 32 see n 389 et seqq.

1024 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 9. Given that the provision explicitly addresses individuals, it is clear that the natural person must be a party to the professional ban proceedings. Proceedings can be conducted separately against the institution and against the natural person or jointly under a consolidated procedure. In separate proceedings, the order against the institution does not have a binding effect on the individual, see Kuhn, Finanzmarktenforcement, 375; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 36.

the responsible person for the misconduct was hierarchically often below the corporate bodies, which the irreproachability procedure could not target. Thereby, by implementing FINMASA 33 there were aims to address this issue by allowing FINMA to prohibit responsible individuals in a management capacity, also below the level of corporate bodies, from holding a managerial position in a supervised institution.[1025] The irreproachability procedure and the professional ban can both be pursued complementarily.[1026]

The legal nature of FINMASA 33 has sparked discussions since its introduction, however it is not of relevance with regards the herein researched context.[1027] In summary, the prevailing doctrine sees the professional ban under FINMASA 33 overall as an administrative sanction with specific and general preventive effects. It also has a certain repressive character, as it punishes the misconduct of the responsible person and in this sense seeks a form of retribution.[1028] Despite this repressive element, it does not constitute a criminal charge.[1029] 331

1.1.2. *Personal Scope of Application*

There is no consensus on which group of people exactly falls under the personal scope of application. Some argue that the norm text of "management capacity" limits the personal scope to individuals who already held a leadership position at the time of the serious violation of supervisory provision.[1030] Others 332

1025 BBl 2006 2881 et seq.

1026 See n 358 herein.

1027 Zufferey/Contratto, 137; Beck, n 382 with further references; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 94.

1028 Niggli/Mäder, Jusletter 2016, n 47 with reference to Graf, AJP 2014, 1201; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 6; Uhlmann, SZW 2011, 441, 444; furthermore see Zufferey/Contratto, 137; Kuhn, Finanzmarktenforcement, 370, Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 93. Some see the repressive element as predominant and therefore qualify the instrument as a repressive sanction, see e.g. Beck, n 384; Kuhn, Berufsverbot, 68.

1029 FCD 142 II 243 consid. 3.4; FSC decision 2C_315/2020 from 7 October 2020 consid. 4.1; FSC decision 2C_771/2019 from 14 September 2020 consid. 5.2; FSC decision 2C_192/2019 from 11 March 2020, consid. 3. This is of particular relevance from a procedural perspective, as the procedural guarantees under the Article 6 section I European Convention on Human Rights do not apply, since it is denied to constitute a criminal charge. See e.g. Hsu/Bahar/Flühmann, BSK FINMASA 33 n 10d, 11; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 93; Graf, AJP 2014, 1201; Niggli/Mäder, Jusletter 2016, n 51-58; Beck, n 408-418 for a detailed discussion of this topic.

1030 BBl 2006 2881 et seq.; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 13a, with further references; Uhlmann, SZW 2011, 439.

interpret the criterion of "management capacity" as referring exclusively to the scope and consequence of the professional ban and not to the group of individuals covered by the provision.[1031] Recently, the Federal Administrative Court held that the professional ban can also be imposed on individuals who held an inferior position at the time of misconduct in order to prevent a such person from assuming a management position in the future.[1032] Moreover, FINMASA 33 does not require that the individual in question currently holds a position in the supervised entity or financial industry in general; it can also be imposed on former employees.[1033]

333 Even with a restrictive interpretation, individuals who held a leadership function at the time of the misconduct fall within the personal scope. With an extensive interpretation, it also includes individuals who did not hold such a function but may do so in the future, thus encompassing the herein discussed individual senior managers in any case.

1.1.3. *Material Scope of Application*

1.1.3.1. Serious Violation of Supervisory Provisions

a. General Definition of the Requirement

(i) Supervisory Provisions

334 As most of the enforcement instruments discussed herein require a *serious violation of supervisory provisions*, this terminology will initially be defined for the purpose of the ensuing analysis, before it is applied to the professional ban and further instruments. The serious violation of supervisory provisions constitutes an indeterminate legal term.[1034] FINMA, as the specialised authority, is

1031 KUHN, Finanzmarktenforcement, 370, 379; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 95; ZUFFEREY/CONTRATTO, 142. This broader view is sometimes limited by stating that the imposition of a professional ban is likely to be proportional only if the individual in question is potentially eligible for a leadership position in the future. Cf. e.g. KUHN, Finanzmarktenforcement, 379.

1032 FAC decision B-4672/2017 from 27 February 2020 consid. 3.4; similarly, FAC decision B-3625/2014 from 6 October 2015 consid. 6.4.

1033 FCD 142 II 243 consid. 2.2; FSC decision 2C_771/2019 from 14 September 2020 consid. 15; FSC decision 2C_192/2019 from 11 March 2020 consid. 3.1; KUHN, Finanzmarktenforcement, 370; HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 13b.

1034 FSC decision 2C_192/2019 from 11 March 2020 consid. 5.1; see also FAC decision B-3625/2014 from 6 October 2015 consid. 10.7.1.

afforded significant discretion and the courts retain the authority to review the interpretation and application of this term.[1035] The *supervisory provisions* primarily encompass the financial market laws mentioned in FINMASA 1 I, including, among others, acts, ordinances and its implementing provisions, as well as Circulars issued by FINMA and recognised self-regulatory standards.[1036]

Thereby, the herein relevant provisions in BankA 3 II a in conjunction with BankO 11, which set forth an organisational set up, including a separation of functions, as well as irreproachability guarantee in BankA 3 II c, which generally account for such supervisory provisions.[1037] As Bank 3 II c encompasses the adherence to the legal order in general, such violations can also be relevant under the *violation of supervisory provision*.[1038] Most importantly, significant deficiencies in the banks' organisation (BankA 3 II a) can, *inter alia*, also be relevant with regards to the irreproachability guarantee (BankA 3 II c).[1039] Moreover, breaches of relevant norms from company law can be relevant under BankA 3 II c, as well as for instance committing fraud or embezzlement.[1040] Violations of norms in general can also be seen as a lack of professional skills by the irreproachable person and consequently, professional competency may be called into question if it is found that violations of supervisory law are due to a lack of knowledge of the banking system rather than malicious intent.[1041] The Federal Administrative Court acknowledges the broad discretion FINMA is afforded with in terms of the provisions of BankA 3 II a and c, but generally sees them as sufficient legal bases (in reference to FCSC 36).[1042] However, high 335

1035 FSC decision 2C_192/2019 from 11 March 2020 consid. 9.3; FAC decision B-3092 from 25 April 2018 consid. 3.2; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 78; HSU/BAHAR/FLÜHMANN, BSK FINMASA 32 n 22; ZUFFEREY/CONTRATTO, 133; HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 17.

1036 HSU/BAHAR/FLÜHMANN, BSK FINMASA 32 n 19 et seq.; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 77; KUHN/WYSS, Finanzmarktenforcement, 355 et seq.; BBl 2006 2880; FAC decision B-1576/2019 from 29 November 2021 consid. 9.3.

1037 Cf. FAC decision B-1576/2019 from 29 November 2021 consid. 9.8, see also n 183 et seqq. of this thesis for a discussion of these provisions.

1038 See e.g. HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 15, 19; KUHN/WYSS, Finanzmarktenforcement, 356; see also n 200-203 of this thesis for the content of this provision.

1039 FAC decision B-1048/2018 from 19 May 2020 consid. 7.2; FINMA, Report UBS FX, 14.

1040 BERTSCHINGER, SZW 2021, 745; KUHN/WYSS, Finanzmarktenforcement, 356.

1041 BRAIDI, n 286 et seq.; see also KLEINER/SCHWOB, SK BankA 3 n 63.

1042 FAC decision B-3092/2016 from 25 April 2018 consid. 3.4.3; FAC decision B-688/2016 (2018 IV/5) from 11 June 2018 consid. 3.3; see also NOBEL, § 5 n 149. Some argue that BankA 3 II c is too broadly formulated, therefore per se does not meet the requirement of specificity (especially with regard to the professional ban) and therefore a such violation cannot account for a severe violation of supervisory law, see HABERBECK, Jusletter 2016, n 21.

demands are placed on the sufficient substantiation if breaches of these norms are brought forward.[1043]

336 FINMA-*Circulars* are considered supervisory provisions in enforcement proceedings, according to the Federal Council's Gazette on the FINMASA.[1044] While they are not directly binding on the supervised entities, FINMA can issue orders based on the applicable financial market laws when a supervised entity fails to comply with its provisions. From a technical perspective, compliance with the provisions in the Circulars is generally derived from the statutory provisions concretised by the Circular.[1045] Hence, the Federal Supreme Court also referred to the obligations in the predecessor Circular to the current FINMA-Circ. 17/1 (which is *inter alia* based on BankA 3 II a and c), stating that they may also be considered as supervisory provisions to the extent that they concretise such.[1046] While the courts are not bound by these Circulars, it was also held that they must be taken into account if they allow for an interpretation of the applicable legal provision. Such Circulars can only specify their underlying legal provisions but cannot alter them.[1047]

337 According to the Federal Administrative Court, *internal rules* of banks do not qualify as legal provisions, given they lack the character of public law norms. Moreover, it would be problematic from the perspective of legal equality if the supervisory authority were to impose higher requirements on employees of one bank with strict internal rules compared to employees of another bank with lax internal rules. Thus, a violation of internal rules alone does not constitute a severe breach of supervisory law.[1048] However, it is noted that internal rules are precisely meant to ensure compliance with supervisory regulations

1043 FAC decision B-688/2016 (2018 IV/5) from 11 June 2018 consid. 5.5. The requirement for substantiation arises from general administrative law, which stems from the right to be heard (FCSC 29 II). The obligation to provide substantiation is generally subject to higher demands the broader the scope of decision-making authority is according to the applicable norms and the more complex the factual and legal issues are, see HÄFELIN/MÜLLER/UHLMANN, n 1070-1073.

1044 BBl 2006 2880.

1045 HSU/BAHAR/FLÜHMANN, BSK FINMASA 32 n 20; BRAIDI, n 1094; see also fn 464 of this thesis for a description of the legal quality of FINMA-Circulars.

1046 FSC decision 2C_771/2019 from 14 September 2020 consid. 17.1; FSC decision 2C_790/2019 from 14 September 2020 consid. 10.2.1, hence it was referred to FINMA-Circ. 08/24; see also n 171-175 of this thesis for the development of the Circular.

1047 FSC decision 2C_894 from 18 February 2016 consid. 4.6.4; see also FAC decision B-1048/2018 from 19 May 2020 consid. 7.1, both with further references.

1048 FAC decision B-1576/2019 from 29 November 2021 consid. 9.3.

within an institution, and thus, disregarding internal instructions can be causative for a severe breach of supervisory law.[1049]

In summary, the serious violation of supervisory provisions generally encompasses the herein relevant BankA 3 II a and c and BankO 11. As Bank 3 II c comprises adherence to the legal order in general, such violations can also be relevant. FINMA-Circulars are considered supervisory provisions in enforcement proceedings in the sense that they detail statutory provisions, although they do not legally bind courts. Internal bank rules are generally not understood as a supervisory provision in this sense, yet if their violation also breaches supervisory law, they also fall under this terminology. 338

(ii) Serious

The requirement of the *seriousness* of the supervisory provision violation pertains to the principles of proportionality and opportunity. There are no abstract criteria or thresholds that define when a violation is serious (or: severe) enough. Each case must be examined in respect to its context and circumstances to determine if the specific breach justifies the intended sanction under the FINMASA framework.[1050] 339

Generally, the severity of the breach is determined by the intensity of the misconduct and the significance of the disregarded obligations.[1051] A one-time, minor, and subordinate breach of minor regulations typically does not warrant sanctions.[1052] In absence of a general rule or threshold to assess severity, some common aspects can be identified on which FINMA upon relies in its assessment. Such include: the individual's effective position within the institution, including her concrete influence; recurrence of the irregularity; significance of the violated duty; degree of culpability, whether the violation is intentional, wilful omission, or negligent ignorance; personal intent for enrichment; and harm caused to creditors or investors, or if no actual harm is found, the intensity of the potential threat to interests.[1053] 340

1049 KUHN, Finanzmarktenforcement, 375.

1050 GOTTINI/VON DER CRONE, SZW 2016, 643; FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 78; KUHN/WYSS, Finanzmarktenforcement, 355; HSU/BAHAR/FLÜHMANN, BSK FINMASA 32 n 19; FSC decision 2C_771/2019 from 14 September 2020 consid. 16.1; FSC decision 2C_192/2019 from 11 March 2020 consid. 4.5. For the principle of proportionality see also fn 795 of this thesis.

1051 HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 17.

1052 FAC decision B-3625/2014 from 6 October 2015 consid. 10.7.2; KUHN/WYSS, Finanzmarktenforcement, 355.

1053 BRAIDI, n 1113-1120 with further references to relevant court decisions.

341 Also, the more severe the implications of the measure, the higher the requirements for the seriousness of the supervisory breach.[1054] Given that the serious violation of supervisory provision is a prerequisite in many enforcement instruments, the threshold for the seriousness of the supervisory breaches in the issuance of mere declaratory ruling (FINMASA 32) are less stringent than in the case of imposing a professional ban (FINMASA 33) or confiscation (FINMASA 35). For both of the latter measures which explicitly target individuals, the same high standard applies, according to court practice.[1055]

b. Application of the Requirement

342 After the preceding general definition of the requirement of *serious violation of supervisory provisions*, the application of this requirement under FINMASA 33 will now be examined. The imposition of a prohibition from practising a profession explicitly requires a serious violation of supervisory provisions (cf. FINMASA 33).[1056] Under the professional ban, a violation is considered serious if for instance, the conduct in question persists over an extended period or occurs systematically. Isolated breaches of norms, rules, or directives that are of lesser significance thereby do not qualify as a serious violation.[1057] High demands are also placed on the clarity and precision of the violated supervisory provision in the specific case, given that this instrument significantly restricts the economic prospects of the individual concerned. The sanction of a professional ban must be foreseeable for the affected party.[1058] As for the question of whether a professional ban is necessary and proportionate, FINMA as the specialised authority exercises technical discretion.[1059]

343 A serious violation of supervisory provisions was, for example, affirmed in a case where a member of the bank's board of directors was informed about critical internal reports relating to an investment project of the institution, but failed to ensure, through appropriate inquiries or personal contributions, that the corporate bodies were fully informed in this regard. Thereby he was found responsible for the severe violation of BankA 3 II a by the bank. In addition, the

1054 KUHN/WYSS, Finanzmarktenforcement, 355.

1055 BRAIDI, n 1111 et seq.; with reference to (inter alia) FAC decision B-5121/2011 (2012/10) from 31 May 2012 consid 8.1.2.

1056 ZULAUF, FINMA Sonderbulletin 2013, 18 et seq.; KUHN, Finanzmarktenforcement, 376.

1057 KUHN, Finanzmarktenforcement, 376.

1058 FAC decision B-1576/2019 from 29 November 2021 consid. 9.3, 9.81., 9.10; FAC decision B-3625/2014 from 6 October 2015 consid. 6; FAC decision B-3092/2016 from 25 April 2018 consid. 3.4.3.

1059 FAC decision B-1576/2019 from 29 November 2021 consid. 10.2; ZUFFEREY/CONTRATTO, 140.

individual repeatedly breached the internal abstention rules regarding the investment project, which constituted an infringement of BankA 3 II c. Consequently, FINMA imposed a professional ban of two years.[1060]

344 However, in practice most of the professional bans are imposed based on violations in the area of market supervision.[1061] Such can still constitute a breach of BankA 3 II a and c. For instance, a former CEO was given a three-year professional ban after he committed market manipulation by initiating actions to influence the bank's stock prices, which also resulted in a breach of BankA 3 II c by the institution.[1062] Or, with regards to conduct supervision, the former CEO of *Falcon Bank* was considered responsible for a serious violation of anti-money laundering provisions in the context of the alleged 1 MDB corruption scandal, which also infringed BankA 3 II a of the bank.[1063] In this case, it was left open whether norm violations in areas which are not directly regulated by supervisory law, but nevertheless seriously undermine the guarantee for irreproachable business conduct, can be deemed a severe breach of supervisory provisions under FINMASA 33 (or 35).[1064] Similarly, in a separate case of Falcon Bank's general counsel, it was also left open whether BankA 3 II c can constitute a sufficient basis for a severe violation of supervisory law under FINMASA 33. This was not considered necessary, as already a severe violation of anti-money laundering provisions was identified, which was seen as sufficient to impose a professional ban.[1065]

1060 FINMA, Case Report 2021-10. The person furthermore violated the duty to provide information and to report in FINMASA 29. The ruling was not appealed.

1061 FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 91.

1062 FINMA, Enforcement Report 2014, 26; see also FINMA, Press Release Bank Coop from 29.10.2014.

1063 FAC decision B-1576/2019 from 29 November 2021 consid. 7.2; 10.6. Falcon Private Bank violated anti-money laundering regulations as it inadequately investigated business relationships and transactions booked in Switzerland, Singapore, and Hong Kong, relating to the Malaysian state fund (1 MDB), which was subsequent to an alleged corruption scandal. FINMA concluded its enforcement proceedings against the institution revealing serious deficiencies in anti-money laundering efforts and risk management for years. Approximately USD 3.8 billion in assets were transferred to Falcon's accounts in connection with the 1 MDB group, see FINMA, Press Release Falcon 13.10.2016, 1-4 for details. For further discussions of this case see this thesis regarding FINMASA 33: n 351, 356; regarding FINMASA 35: n 372; regarding FINMASA 31: n 383.

1064 FAC decision B-1576/2019 from 29 November 2021 consid. 9.10.

1065 FAC decision B-488/2018 from 17 January 2019 consid. 4.6. This decision was overturned by the Federal Supreme Court (cf. FSC decision 2C_192/2019 from 11 March 2020), however the violation of BankA 3 II c is not addressed in its decision. For another example of this court practice see e.g. FSC decision 2C_747/2021 from 30 March 2023 consid. 15.1.

1.1.3.2. Forms of Violation

345 Generally, the serious breach of supervisory provisions can occur through both active actions and omissions. For example, failing to act in accordance with monitoring obligations may lead to deficiencies within an institution and thereby cause a serious breach. In the case of an allegation of omission, only acts that were negligently not carried out can be relevant for the imposition of a professional ban. Thus, an action required by supervisory law must be deliberately omitted.[1066]

346 With regards to FINMASA 33, the instrument was, for example, imposed due to an omission in a case where the chair of the board of directors of a bank had access to privileged information that could notably have significant repercussions on the financial situation of the institution. The individual failed to engage in in-depth considerations and subsequent measures and directives at board level and transmitted the entirety of this information to the bank only belatedly. Thereby, the institution was hindered from conducting effective risk management and BankA 3 II a in conjunction with BankO 12 II were severely violated, alongside provisions of the predecessor of today's FINMA-Circ. 17/1, as well as internal regulations. The chair was given a professional ban of five years.[1067] While FINMA additionally found that this behaviour violated BankA 3 II c, the courts left this question open.[1068] In the same matter and following a similar reasoning, a member of the supervisory body was also given a professional ban of three years.[1069]

1066 FCD 142 II 243 consid. 3.1; FSC decision 2C_771/2019 from 14 September 2020 consid. 16.1; see also FAC decision B-3092/2016 from 25 April 2018 consid. 3.4.

1067 FSC decision 2C_771/2019 from 14 September 2020 consid. 17.1, 17.3; see also FINMA, Case Report 2016-08, as well as FINMA, Annual Report 2020, 63, moreover it was also found that the chair was responsible for the bank's violation of its duty to inform FINMA according to FINMASA 29.

1068 Cf. FINMA, Case Report 2016-08; FSC decision 2C_771/2019 from 14 September 2020 consid. 16.2, 22 with reference to the preceding FAC decision B-5518/2016 from 10 July 2019 consid. 12.2. Specifically, the FAC left the question open whether this behaviour also constituted a violation of BankA 3 II c and the FSC did not recognise the question as a subject of dispute. See also n 352, 394 of this thesis for a further discussion of the case.

1069 Cf. FINMA, Case Report 2016-07; FSC decision 2C_790/2019 from 14 September 2020 consid. 10.2; see previous fn for further discussions of the case.

1.1.3.3. Individual Attribution

a. Definition

Enforcement proceedings against individuals often follow after the proceedings in the same matter against the institution have been concluded. Even if in this preceding enforcement procedure it was found that the institution severely violated supervisory law (also: violation or breach), this violation cannot automatically be attributed to an individual. Instead, the breach must be established in a proceeding in which the individual in question is granted party status.[1070] Thereby it must be shown that the violation in question is *individually attributable* to the person to be sanctioned.[1071] Consequently, it is necessary that the violation was caused causally and culpably by this person.[1072] Culpable behaviour can be present in cases of intent or mere negligence. Generally, there are no high demands placed on this aspect.[1073] 347

In an organisation with division of labour, individual attribution means that the serious breach of supervisory regulations must have occurred within the area of responsibility of a specific person, according to the Federal Supreme Court. For the imposition of a supervisory measure, three allegations must cumulatively or alternatively apply with legal sufficiency: there is an active supervisory law violation; knowledge of the supervisory law violation, and a negligent failure to act against it; a lack of knowledge of a breach of supervisory provision despite a duty of knowledge.[1074] This would generally imply that for the professional ban to be imposed, the breach of supervisory law must not necessarily have been committed personally by the individual in question, but rather, in principle, such a manager can also be held to account if the violation was committed by employees for whose actions the person is responsible.[1075] Similarly, the Federal Administrative Court held that the professional ban should be imposable not only to the individual in question who directly exe- 348

1070 FCD 142 II 243 consid. 2.3.

1071 FSC decision 2C_192/2019 from 11 March 2020 consid. 3.2.

1072 FCD 142 II 243 consid. 2.2; FSC decision 2C_771/2019 from 14 September 2020 consid. 16.1; FSC decision 2C_192/2019 from 11 March 2020, consid. 3.2; FAC decision B-3625/2014 from 6 October 2015 consid. 6.4; KUHN, Finanzmarktenforcement, 377; HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 13c; GRAF, AJP 2014, 1203.

1073 FSC decision 2C_192/2019 from 11 March 2020, consid. 3.3; see also FAC decision B-3625/2014 from 6 October 2015 consid. 6.4.

1074 FSC decision 2C_192/2019 from 11 March 2020 consid. 3.2.

1075 ZUFFEREY/CONTRATTO, 141; cf. FSC decision 2C_192/2019 from 11 March 2020, consid. 3.2 which also refers this source.

cuted the actions, but potentially also to those in supervisory or managerial roles responsible for their actions.[1076] Yet, these considerations of the courts were made in the context of anti-money laundering violations and which also resulted in breaches of organisational and / or irreproachability requirements. With regards to the present context, however, the situation is seemingly not as straightforward.

b. Individual Attribution in Complex Organisational Structures

349 Whether these principles, set forward by the courts, also apply to *direct* violations of BankA 3 II a and c cannot be easily answered. Given often complex organisational structures and internal processes, the delimitations of respective responsibilities and areas of competence are not always clear in practice.[1077] Moreover, FINMA noted that responsibility cannot simply be derived for legal violations solely from a hierarchical level or position, as it is essential to establish a proven breach of duty that directly led to the supervisory violation.[1078] Some however find this to be an overly restrictive application of the professional ban, as responsibility within multi-level leadership structures in financial institutions should not easily dissipate, and if it does, this would require regulatory adjustments with regards to the organisational requirements in BankA 3 II a. Thereby it was advocated for a more open application. Consequently, for example, an elusive email would not be required to establish individual attribution. On the contrary, the absence of documented communication from a manager in a specific scenario may indicate inadequate oversight of subordinate areas. It is summarised that while responsibility should not automatically dissipate due to multiple hierarchical levels, the accountability for a legal violation can also not be established solely because of a hierarchical level or position of an individual.[1079]

350 In 2014, when discussing its heightened focus on individuals in enforcement, FINMA stated that senior managers can be sanctioned with enforcement instruments not only when the individuals themselves were involved in manipulation, but also when they fail to comply with their due diligence and supervision obligations, however noting that such procedures are inherently complex.[1080] Later, FINMA openly stated that the individual attribution of a se-

1076 FAC decision B-3625/2014 from 6 October 2015 consid. 6.4.
1077 KUHN, Finanzmarktenforcement, 378.
1078 FINMA, Press Release Julius Baer Managers 21.1.2021, 2.
1079 BERTSCHINGER, SZW 2021, 745-747 with further references.
1080 FINMA, Annual Report 2014, 74.

vere supervisory provision regularly poses a challenge, as the breach of duty which specifically led to the violations in question must be proven by the authority, calling it a "major hurdle".[1081] In reference to the British Senior Managers and Certification Regime (SM&CR), FINMA advocated for the instrument of the clear allocation of responsibilities under the regime.[1082] Furthermore, FINMA already installed aspects of this responsibility allocation in its proceedings regarding the *Credit Suisse* "*Archegos*" case.[1083] Moreover, the evaluation of the SM&CR in order to reduce the hurdle of individual attribution in imposing a professional ban was a suggestion of the expert group on banking stability following the emergency takeover of Credit Suisse by UBS.[1084]

c. Application

A look at the practice of individual attribution in the context of professional bans for violations of BankA 3 II a and c preliminarily paints the following picture: not surprisingly, in the context of anti-money laundering cases, the Federal Supreme Court has established that internal task allocation cannot undermine supervisory law (referring to so-called organisational failure). It ruled that individuals cannot exonerate themselves by referring to the division of tasks.[1085] For example, in the case concerning *Falcon Banks*' *former* CEO the individual was verifiably directly involved in the transactions and aware of suspicious circumstances but did not intervene; he instead rather ensured a smooth completion of the transactions.[1086] Thereby, a breach of anti-money laundering provisions was directly attributable to him and the individual was also held accountable for severe supervisory violations of the bank, which included BankA 3 II a.[1087] 351

1081 FINMA, Press Release Julius Baer Managers 21.1.2021, 2; Amstad, FINMA Address 2023, 5.

1082 Amstad, FINMA Address 2023, 5; FINMA, Report CS Crisis 2023, 48; see also n 233 of this thesis for the referred instrument under the SM&CR.

1083 Cf. FINMA, Press Release CS Greensill 28.2.2023, 1-4, especially 3; FINMA, Case Report 2022-16; see also n 386 of this thesis.

1084 Expertengruppe Bankenstabilität, Report 2023, 58, 65, 81, 85. See also fn 376 and n 6 of this thesis for a further discussion of the report.

1085 FSC decision 2C_192/2019 from 11 March 2020 consid. 3.2. It must be noted that while this statement was made in a general sense, it is still in the context of a case involving a breach of anti-money laundering obligations. In making this statement, the Federal Supreme Court particularly relies on sources from criminal law.

1086 FINMA, Case Report 2019-01; see also FAC decision B-1576/2019 from 29 November 2021 consid. 7 and 8 for an elaboration of the facts; For further discussions of this case see also this thesis regarding FINMASA 33: n 344, 356; regarding FINMASA 35: n 372; regarding FINMASA 31: n 383.

1087 FAC decision B-1576/2019 from 29 November 2021 consid. 10.6.

352 Moreover, individual attribution was established in the cases of the chair and the member of the bank's supervisory board who failed to engage in in-depth considerations and subsequent measures and directives at the board level, despite having access to privileged information that could notably have significant repercussions on the financial situation of the bank. These individuals were acting culpably by violating their duty of care and loyalty towards the bank (cf. CO 717 I).[1088] Consequently, their behaviour directly led to the severe supervisory violations of the bank (*inter alia* BankA 3 II a) and was thereby considered causal.[1089]

353 However, in a case of the bank *Julius Baer*, it was preliminarily found that the *institution*, *inter alia*, severely violated BankA 3 II a with its involvement in two large-scale cases of alleged corruption in which the bank fell significantly short in its anti-money laundering duties. Consequently, the organisational culture and the firm's risk culture were considered inadequate. More specifically, systemic failures in risk management were identified, given a repeated failure to react, adequately or at all, to clear indications of money laundering risks. After concluding the enforcement procedure against the bank, FINMA examined whether to open proceedings against *individuals*.[1090] Subsequently, the supervisory authority highlighted the difficulty in proving individual attribution, opened an enforcement proceeding against one individual, issued two reprimands, and closed one after a declaration of resignation.[1091]

354 In another example, FINMA imposed a professional ban on a former co-head of the global forex and precious metals trading division at UBS for gross negligence in supervisory duties. The person failed to monitor subordinates, establish an adequate control framework and increased bank risks, leading to the

1088 FSC decision 2C_771/2019 from 14 September 2020 consid. 19; FSC decision 2C_790/2019 from 14 September 2020 consid. 11, 11.4; see also n 346, 394 of thesis for a further discussion of the case.

1089 FSC decision 2C_771/2019 from 14 September 2020 consid. 20; FSC decision 2C_790/2019 from 14 September 2020 consid. 12.

1090 FINMA, Press Release Julius Baer Institution 20.2.2020, 1-3; FINMA, Case Report 2020-01, This case was concerned with the alleged corruption involving the Venezuelan state oil company Petróleos de Venezuela (PDVSA) and the international football association (FIFA), where FINMA investigated several Swiss banks, including Julius Baer. It was concluded that the bank violated anti-money laundering obligations which were encouraged through organisational failures and misaligned incentives, see Press Release for details. For a further discussion of this case see also n 383, 395 of this thesis.

1091 FINMA, Press Release Julius Baer Managers 21.1.2021, 1-2, see previous footnote for further references.

bank's multi-year violations of BankA 3 II a and c.[1092] However, the Federal Administrative Court overturned FINMA's decision, emphasising that in establishing individual attribution, the supervisory authority is held to high standards regarding its obligation for it to sufficiently substantiate its decisions (cf. also APA 35). Thereby a concrete substantiation on how the individual specifically, versus the institution, breached supervisory provisions was required, which was not provided.[1093] In another instance where FINMA sought to impose a professional ban because of risk management deficiencies (today in BankO 12), the Federal Supreme Court stated that it is necessary to clearly identify the source of the legal obligation and how the individual failed to fulfil it. Each risk must be separately outlined, explaining how the individual in question should have recognised, assessed, and limited it.[1094] While this is mainly a procedural topic, it feeds into the difficulty of establishing individual attribution to high-ranking individuals and consequently a potential constraint in the application of the instruments to individuals.

1.1.4. *Declaration of Resignation*

It is worth noting that it is at FINMA's discretion to decide whether it wants to impose a professional ban or not, even if all the requirements are met.[1095] The supervisory authority might refrain from an imposition if a *declaration of resignation* (following also: declaration) is provided. This should be submitted by the person in question who declares her full, indefinite, unconditional and irrevocable withdrawal from a position at management capacity in the financial sector. Nevertheless, FINMA is not obligated to accept such a declaration. According to the supervisory authority, it decides on a case-by-case basis whether the supervisory goals are already secured with the declaration of the person and consequently it may therefore see it as proportionate to dispense enforcement proceedings without installing a professional ban.[1096] Individuals

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1092 FAC decision B-688/2016 (2018 IV/5) from 11 June 2018 consid. 2.2.
1093 FAC decision B-688/2016 (2018 IV/5) from 11 June 2018 consid. 5.5.
1094 FCD 142 II 243 consid. 3.1.
1095 Kuhn, Finanzmarktenforcement, 373.
1096 BBl 2006 2882; FINMA, Annual Report 2022, 61; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 13b; Zufferey/Contratto, 143; Zulauf, FINMA Sonderbulletin 2013, 19 et seq.

adopting this strategy seek to end enforcement proceedings without formally facing any measures being imposed.[1097] Some see this practice as at least weakening the general-preventive character of the measure.[1098]

356 For instance, in a case regarding *Raiffeisen*, FINMA refrained from continuing its launched enforcement proceedings against the former CEO of the bank, after he declared that he will not take on a management position in the financial sector at any time in the future. FINMA therefore saw the proceedings as obsolete and stated it would have not achieved anything more by e.g. imposing a professional ban.[1099] Similarly, concerning *Credit Suisse*'s "*observation activities*", FINMA concluded two proceedings against individuals after they provided such a declaration.[1100] However, as an opposing example, the Federal Administrative Court upheld a professional ban imposed against the former CEO of *Falcon Bank*, despite him declaring that he will retire early and not take on a management function in the financial industry in the future. The professional ban was deemed appropriate for general preventive reasons, as the globally renowned role of the bank in the alleged corruption scandal surrounding 1 MDB, being one of the largest known money laundering cases, damaged the reputation of the entire Swiss financial centre for which the CEO was seen as significantly responsible.[1101]

1.1.5. *Scope of Consequences*

357 The person affected is not generally prohibited from all activities in the financial market. Instead, the individual subject to a professional ban is prohibited from acting in a management capacity within a supervised entity, for a maximum of five years. FINMA must adhere to the principle of proportionality when determining the duration, considering the significant interference with economic freedom a professional ban entails. Relevant factors for determining

1097 BBl 2006 2881; KUHN, Finanzmarktenforcement, 372; see 373 for the requirements of such declarations of resignation.

1098 UHLMANN, SZW 2011, 448.

1099 FINMA, Press Release Raiffeisen 14.6.2018, 5; FINMA, Press Release Pierin Vincenz 21.12.2017; see also FINMA, Annual Report 2022, 60. See also n 382 of this thesis for a further discussion of the case.

1100 FINMA, Annual Report 2022, 61; FINMA, Press Release CS Observation 20.10.2021, 2-3; see also n 384, 395, 382 of this thesis for a further discussion of the case. As a similar example see also the Julius Baer, Press Release Julius Baer Managers 21.1.2021, 1-2 (for a further discussion of this case see n 353, 383, 395 of this thesis).

1101 FAC decision B-1576/2019 from 29 November 2021 consid. 10.6. For further discussions of this case see also this thesis regarding FINMASA 33: n 344, 351; regarding FINMASA 35: n 372; regarding FINMASA 31: n 383.

the duration include the extent of the regulatory violation, the potential harm to depositors and the financial market, as well as the level of involvement of the individual in question.[1102] According to some, the prohibition from practising a profession can be seen as being equivalent to the (hypothetical) revocation of a license, which is considered to be at odds with the fact that generally the Swiss financial market law knows no licensing regime for individuals, and certainly not one for the senior management of banks.[1103] Generally, the imposition of FINMASA 33 is not subject to publication. However, *theoretically*, the supervisory ruling could be published if the conditions of FINMASA 34 are met.[1104]

1.2. Irreproachability Procedure

1.2.1. *Content and Function*

If the fulfilment of the guarantee of irreproachable business conduct is in question, FINMA can initiate a so-called irreproachability procedure (*Gewährsverfahren*).[1105] Such irreproachability procedures in the negative sense can be triggered when a potential relevant misconduct occurs which involves either a person currently holding a guarantee position or a person who is intending to assume a such position.[1106] The irreproachability procedure was established before the formal introduction of enforcement instruments under FINMASA. It already had similar effects as the professional ban, even when the supervisory authority lacked the competence to sanction individuals.[1107] The practice continued after the introduction of the formal instrument (FINMASA 33). They constitute two separate measures, are complementary and can generally also be combined.[1108] Still today the irreproachability procedure is not formally foreseen in a legislative act but rather constitutes an established practice. 358

1102 KUHN, Finanzmarktenforcement, 379 et seq.; ZUFFEREY/CONTRATTO, 143.

1103 ZUFFEREY/CONTRATTO, 137; UHLMANN, SZW 2011, 439.

1104 ZUFFEREY/CONTRATTO, 146; see also n 397 et seqq. of this thesis for a further discussion of this instrument.

1105 BAUMGARTEN/BURCKHARDT/ROESCH, AJP 2006, 173, while the statement is made in reference to FINMA's predecessor authority it holds true until today. See also n 200 et seqq. of this thesis for the content of the irreproachability guarantee.

1106 NOBEL, § 7 n 180 et seq.; KUHN/WYSS, Finanzmarktenforcement, 367, STALDER, Bankgeschäft, n 251.

1107 HSU/BAHAR/FLÜHMANN, BSK FINMASA 33 n 2.

1108 BBl 2006 2882; so auch ZUFFEREY/CONTRATTO, 144; ZULAUF, FINMA Sonderbulletin 2013, 18; KUHN, Finanzmarktenforcement, 370; FCD 142 II 243 consid. 2.2; FAC Decision B-3625/2014 from 6 October 2015 consid. 6.4.

359 The irreproachability procedure differs from an irreproachability assessment in the positive sense.[1109] Yet, this negative assessment is also past-oriented. Based on past incidents it is determined whether the irreproachability requirements are still fulfilled in the present and what predictions can be made for the future. Furthermore, the evaluation of whether a person provides the irreproachability guarantee is also conducted with regard to a specific position and measured against the tasks associated with it. It serves preventive goals.[1110] Rather than being considered a sanction, it constitutes a prudentially motivated measure taken by the supervisory authority. If FINMA determines that the irreproachability guarantee is not (anymore) fulfilled in a specific case, it can impose corresponding measures.[1111] Given the principle of proportionality and the implications of a professional ban on the concerned individual, an irreproachability procedure could be considered as a less intrusive measure.[1112] The current practical use of this procedure cannot easily be identified, as it is very seldomly referred to in the available and evaluated documentation.[1113]

1.2.2. *Personal Scope of Application*

360 The measures imposed with the irreproachable procedure address so-called irreproachable persons within the meaning of BankA 3 II c and not generally management personnel or individuals in leading positions within a bank.[1114] Consequently, it primarily encompasses the members of the supervisory and executive board. The personal scope of application is therefore narrower com-

1109 In the positive sense it refers to the initial assessment of the irreproachability guarantee, see n 214 et seqq. herein, see also n 194 regarding the positive and negative view.

1110 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 27; Zulauf, FINMA Sonderbulletin 2013, 18; Uhlmann, SZW 2011, 440; Baumgarten/Burckhardt/Roesch, AJP 2006, 173; Aellen, 140, 200; see e.g. also FAC decision B-3625/2014 from 15 November 2015 consid. 6.4.; FAC decision B-5535/2009 (2010/39) from 6 May 2010 consid. 4.1.4; FAC decision B-1360/2009 from 11 May 2010 consid. 3.2.1; FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 6.2.

1111 Kuhn/Wyss, Finanzmarktenforcement, 367 et seq.; Baumgarten/Burckhardt/Roesch, AJP 2006, 171 et seq.; Aellen, 231 et seqq.; Beck n 335, 338.

1112 Zufferey/Contratto, 145.

1113 Which is probably at least part due to the limited communication in enforcement in general, see n 318-321 of this thesis for a subsequent discussion. It might also indicate that the instrument is not used as often anymore as it seemingly used to be a popular instrument, for an extensive discussion of earlier cases see e.g. Zulauf, FINMA Sonderbulletin 2013, 10 et seqq.; or also Rhinow/Bayerdörfer, n 53 et seqq.; Aellen, 125 et seqq. See also Kuhn/Wyss, Finanzmarktenforcement, 369, for a newer publication which discusses two examples which are fairly recent.

1114 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 12; Graf, AJP 2014, 1199; see also n 198 et seq. of this thesis for a discussion of the personal scope of application for this norm.

pared to the professional ban.[1115] However, the question of the addressee of the measures must be distinguished from the question of the party status in such a procedure.[1116] Even if the supervisory authority opens enforcement proceedings because of a suspected violation of the guarantee of irreproachable business conduct by an individual, it normally opens the procedure against the concerned bank.[1117]

Moreover, if someone is registered in the watch list due to prior misconduct, currently not holding an irreproachability position, but seeking to assume one, FINMA initiates an irreproachability procedure. As the person is prospective for a role at a supervised entity, there is now considered sufficient declaratory interest for FINMA to assess their irreproachability guarantee fulfilment with regards to said position.[1118] 361

1.2.3. *Material Scope of Application*

As previously presented in detail, the irreproachability guarantee in BankA 3 II c encompasses both moral and professional components and it aims to ensure compliance with legal and regulatory provisions in their entirety.[1119] Consequently, *inter alia*, violations of BankA 3 II a can be relevant in an irreproachability guarantee procedure or also violations of company law.[1120] The misconduct in question must be directly related to the business activities and must raise doubts about the individual's competence.[1121] 362

The material scope of the application of the irreproachability procedure is broader compared to the professional ban, allowing for a wider interpretation 363

1115 Zulauf, FINMA Sonderbulletin 2013, 19; Graf, AJP 2014, 1199 et seq.; Zufferey/Contratto, 139; cf. Gottini/von der Crone, SZW 2016, 644 with further references or also FAC decision B-3625/2014 from 6 October 2015 consid. 6.4; cf. n 332 et seq. of this thesis for the personal scope of application of FINMASA 33.

1116 Baumgarten/Burckhardt/Roesch, AJP 2006, 171 et seq.

1117 FAC decision B-1360/2009 from 11 May 2010 consid. 3.2.2.

1118 Baumgarten/Burckhardt/Roesch, AJP 2006, 175; Nobel, § 7 n 180; Kuhn/Wyss, Finanzmarktenforcement, 367; Uhlmann, SZW 2011, 444; Beck, n 353; FAC decision B-1360/2009 from 11 May 2010 consid. 3.1.; FAC decision B-3708/2007 (2008/23) from 4 March 2008 consid. 2.2. For details on the watch list see n 274 et seqq. of this thesis.

1119 Uhlmann, SZW 2011, 439, 443; see n 200 et seqq. of this thesis for a discussion on the requirements of BankA 3 II c and n 335 for the relevance of the norm in the context of supervisory law violations.

1120 Cf. e.g. FAC decision B-1048/2018 from 19 May 2020 consid. 7.2.

1121 Graf, AJP 2014, 1200.

of possible violations.[1122] Unlike other instruments, the irreproachability procedure does not necessarily require a qualified severity.[1123] For example, the Federal Administrative Court has emphasised that when regulatory duties are breached without constituting a severe violation, the regulatory state is indirectly enforced through the supervisory duties of the highest managerial level and their guarantee for irreproachable business conduct.[1124] Furthermore, even milder legal breaches or violations of rules which do not classify as legal norms can negatively impact the irreproachability guarantee, whereas such violations do not suffice for imposing FINMASA 33 (or 35).[1125] Consequently, personal or professional shortcomings, which could be relevant in an irreproachability procedure, are not necessarily similarly relevant for the imposition of a professional ban.[1126] Moreover, it was held that an action considered a minor violation of supervisory law does not automatically become a severe violation simply because the individual in question is an irreproachability guarantee holder and the irreproachability guarantee is affected even with minor breaches.[1127] FINMA itself stated that according to its interpretation, the irreproachability guarantee requires individuals (and institutions) to show conduct that protects their clients' interests and does not abuse their trust. It considered that specific breaches of the law are not a necessary prerequisite to prove a violation of the irreproachability guarantee.[1128]

1.2.4. *Scope of Consequences*

364 If it is concluded that a person who currently holds an irreproachability guarantee position no longer provides the required irreproachability guarantee, FINMA can order the removal of the individual from the position. Today it does so by utilising the instrument of restoration of the lawful condition under FINMASA 31.[1129] It is not necessarily required for the individual in question to leave

1122 FAC decision B-3625/2014 from 6 October 2015 consid. 6.4.; Uhlmann, SZW 2011, 439; Zufferey/Contratto, 139.

1123 Uhlmann, SZW 2011, 439, 443 et seq.; unlike e.g. FINMASA 33, see n 342-344 of this thesis.

1124 FAC decision B-3625/2014 from 6 October 2015 consid. 6.4.

1125 FAC decision B-1576/2019 from 29 November 2021 consid. 9.10; similarly also FAC decision B-3625/2014 from 6 October 2015 consid. 6.4. and FAC decision B-3092/2016 from 25 April 2018 consid. 3.4.3; see also Kuhn, Finanzmarktenforcement, 376 with reference to Zulauf, FINMA Sonderbulletin 2013, 19.

1126 Hsu/Bahar/Flühmann, BSK FINMASA 33 n 16.

1127 FAC decision B-1576/2019 from 29 November 2021 consid. 9.10.

1128 FINMA, Report UBS FX, 14.

1129 Winzeler, BSK BankA 3, n 18; Aellen, 236; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 9; Kuhn/Wyss, Finanzmarktenforcement, 366, 368; Baumgarten/Burckhardt/Roesch, AJP

the institution entirely, but the person is no longer allowed to hold a position which requires the guarantee for irreproachable business conduct.[1130] Within the principle of proportionality, milder measures must also be considered.[1131] For example, if the removal of an irreproachable person appears disproportionate, a declaratory ruling (FINMASA 32) could be issued instead.[1132]

If, however measures are imposed through FINMASA 31, such are formally directed against the bank (which must also provide the guarantee for irreproachable business conduct), requiring it to remove the person in question.[1133] The parties to the proceedings are the bank as the main party and the affected individual, yet it is the individuals that are substantially impacted by such measures.[1134] FINMA determines the duration for which it disqualifies a person from holding these or similar positions.[1135] For example, in a case relating to an employee of the highest hierarchical level of the bank, FINMA banned the person from assuming a position which requires the guarantee for irreproachable business conduct for the duration of two years, as the individual failed to provide information requested by FINMA and thereby infringed FINMASA 29 (duty to provide information and to report).[1136] 365

In reality however, it is rare for the FINMA to order the removal of an irreproachable person from a current position. Individuals who were potentially involved in misconduct often voluntarily leave their positions during the proceedings or under pressure from the institution.[1137] As repeatedly mentioned, the guarantee for irreproachable business conduct for a natural person is tied to the actual exercise of an irreproachability function in a supervised institution and is always assessed with regards to a specific function, not abstract.[1138] 366

2006, 172; Graf, 384; Graf, AJP 2014, 1199; see also FAC decision B-3625/2014 from 6 October 2015 consid. 6.3.2; see n 377, 389 et seqq. of this thesis for a discussion of FINMASA 31.

1130 Kuhn/Wyss, Finanzmarktenforcement, 366.

1131 Winzeler, BSK BankA 3, n 18.

1132 Baumgarten/Burckhardt/Roesch, AJP 2006, 172 et seq.; see n 389 et seqq. of this thesis for a discussion of FINMASA 32.

1133 Winzeler, BSK BankA 3, n 18; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 9; Kuhn/Wyss, Finanzmarktenforcement, 366, 368; Uhlmann, SZW 2011, 444; Graf, 384; Nobel, § 7 n 173; Aellen, 236, 240 et seqq.; Baumgarten/Burckhardt/Roesch, AJP 2006, 172, 175; see also FAC decision B-3625/2014 from 6 October 2015 consid. 6.3.2.

1134 Kuhn/Wyss, Finanzmarktenforcement, 366; Baumgarten/Burckhardt/Roesch, AJP 2006, 175; Nobel, § 5 n 166, § 7 n 181; Graf, AJP 2014, 1199.

1135 Kuhn/Wyss, Finanzmarktenforcement, 366.

1136 FINMA, Enforcement Report 2015, 8.

1137 Kuhn/Wyss, Finanzmarktenforcement, 366 et seq.; Beck, n 353.

1138 Nobel, § 7 n 180; Wyss/Kuhn, Finanzmarktenforcement, 367; Beck, n 329; see also n 214 et seqq., 359 of this thesis.

Therefore, if a person left her position, there is no declaratory interest to assess her irreproachability guarantee. Alternatively, a procedure under FINMASA 33 regarding a professional ban might still be deemed necessary for general preventive reasons.[1139] In addition, the misconduct or wrongdoing in question is documented and added to the watch list, and if necessary, an irreproachability guarantee letter is sent to the person concerned.[1140]

367 Furthermore, if a person who is listed in the watch list seeks to take on an irreproachability position, the irreproachability procedure can be opened. In the case of a negative decision, an appealable order must be issued by FINMA within a reasonable timeframe under the principle of proportionality; in a positive scenario the person is authorised to take on the proposed role.[1141]

1.3. Confiscation

1.3.1. *Content and Function*

368 Another instrument under the personal perspective constitutes the confiscation (*Einziehung*) under FINMASA 35. Thereby, FINMA is empowered to confiscate unlawfully gained profits resulting from a serious violation of supervisory provisions by a supervised entity or a responsible person in a management position.[1142] The confiscated assets are transferred to the confederation unless they are paid to the parties suffering loss (FINMASA 35 VI).[1143] Against natural persons the instrument has been rarely applied; only four times between 2014 and 2022, primarily with regards to violations related to market supervision or money laundering provisions.[1144]

369 The legislative intent behind this measure is primarily restorative rather than punitive. The confiscation aims to restore the lawful state and consequently its scope is strictly limited to compensating for the unlawfully gained enrich-

1139 Aellen, 241; Kuhn/Wyss, Finanzmarktenforcement, 366 et seq.; Beck, n 353.

1140 Graf, GesKR 2019, 385; Baumgarten/Burckhardt/Roesch, AJP 2006, 174; see also n 285-287 of this thesis.

1141 Kuhn/Wyss, Finanzmarktenforcement, 367; Reiser, SZW 2022, 549.

1142 Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 80; Hsu/Bahar/Flühmann, BSK FINMASA 33 n 9.

1143 Bösch, BSK FINMASA 35 n 33-36; Kuhn, Finanzmarktenforcement, 401 et seq.

1144 Kuhn, Finanzmarktenforcement, 399; cf. also Bösch, BSK FINMASA 35 n 3a. Of these cases, the imposition was at least once overturned by the FAC, see FAC decision B-1576/2019 from 29 November 2021. During the same period, it was ordered 22 times against institutions, cf. FINMA, Enforcement statistics, Rulings on enforcement cases 2022, accessible through the homepage of FINMA.

ment.[1145] Additionally, this measure seeks to prevent distortions of competition by discouraging the generation of unlawful profits through violations of supervisory provisions and ensuring that compliance with these provisions does not lead to a competitive disadvantage compared to other wrongfully behaving market participants.[1146]

1.3.2. *Personal Scope of Application*

Under the confiscation instrument, FINMA can take action against supervised entities or responsible persons in management positions (FINMASA 35 I). Besides the professional ban, this instrument is the only one that explicitly mentions natural persons as its addressees.[1147] The term in a management position refers not only to irreproachable persons but also includes further individuals holding other leadership roles. Whether a specific position is considered a management role in a given case requires careful consideration of all relevant circumstances (e.g. signing authority, actual scope of responsibility, etc.).[1148] 370

1.3.3. *Material Scope of Application*

1.3.3.1. Serious Violation of Supervisory Provisions

As the professional ban (and most of the other instruments), the confiscation also requires a serious violation of supervisory provisions, such as, for example, breaches of BankA 3 II a, c.[1149] Corresponding to the significance of the intervention, imposing the instrument on an individual is subject to high standards regarding the seriousness of the violation, identical as under FINMASA 33.[1150] 371

1145 BBl 2006 2849 et seq., 2883; Bösch, BSK FINMASA 35 n 4, 7; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 81. The latter further acknowledge that the instrument, precisely because of its compensatory function, is not to be considered as a fine. Those have a clearly penal character, see cited source for details. Also, the FSC denied a possible criminal character for this instrument, cf. e.g. also cf. e.g. FSC decision 2C_315/2020 from 7 October 2020 consid. 4.3. Others argue that beyond its restorative nature, the confiscation could be considered as an administrative sanction from the perspective of those affected, see Zufferey/Contratto, 149.

1146 BBl 2006 2849 et seq., 2883; Zufferey/Contratto, 149 et seq.; Bösch, BSK FINMASA 35 n 3.

1147 Cf. Hsu/Bahar/Flühmann, BSK FINMASA 33 n 9.

1148 Bösch, BSK FINMASA 35 n 11 et seq.; cf. also n 332 et seq. of this thesis.

1149 Kuhn, Finanzmarktenforcement, 392; Bösch, BSK FINMASA 35 n 17; for a definition of the serious violation of supervisory provisions see cf. n 332, 334-341.

1150 Kuhn, Finanzmarktenforcement, 392; FAC decision B-1576/2019 from 29 November 2021 consid. 9.8., 9.8.1 with reference to FCD 142 II 243 consid. 3.1; cf. n 332, 341 of this thesis.

372 For example, the Federal Administrative Court found that FINMA did not fulfil the high standard of substantiation when it imposed FINMASA 35 to the former CEO of *Falcon Bank*. Besides the previously discussed violations of anti-money laundering provisions, FINMA also viewed the CEO as the driving force behind numerous transactions of a client conducted through the bank's own trading account. Due to a lack of verifications of the economic background of these transactions, it found significant financial and reputational risks incurred by the bank. In this context it identified a substantial conflict of interest of the CEO concerning the client in question. With regards to these transactions FINMA imposed FINMASA 35 (besides the previously discussed FINMASA 33).[1151] However, with regard to FINMASA 35, the Federal Administrative Court held that FINMA had not demonstrated clearly enough to what extent violations of supervisory provisions had occurred because of the CEO, despite the need for the supervisory authority to provide a detailed reasoning and a sufficient determination, which is why the imposed confiscation was overturned.[1152] Subsequently, the court left the question open of whether the behaviour in question could constitute a serious breach of the irreproachability guarantee and thus qualify as a severe violation of supervisory provisions.[1153]

373 The criterion severity has, for example, been justified based on the prolonged duration and deliberate nature of the actions of the individual in question.[1154] The determination of the required severity should not primarily focus on the amount of profit realised or losses avoided due to the violation. Rather, it constitutes one of the factors to consider in the comprehensive assessment.[1155] The relevant Federal Dispatch names as a potential example the case where a manager potentially gains profit by allocating securities to himself in an unauthorised manner during an issuance.[1156]

1151 FINMA, Case Report 2019-01. For further discussions of this case see also this thesis regarding FINMASA 33: n 344, 351, 356; regarding FINMASA 31: n 383.

1152 FAC decision B-1576 from 21 November 2021 consid. 9.8.4–9.8.6, 9.11; according to which FINMA criticised that an internal directive did not comply with supervisory law, without sufficiently substantiating this. Moreover, FINMA did not demonstrate how the non-compliance with these internal rules would have violated specific regulatory provisions.

1153 FAC decision B-1576 from 21 November 2021 consid. 9.10.

1154 FSC decision 2C_315/2020 from 7 October 2020 consid. 8.1.

1155 BÖSCH, BSK FINMASA 35 n 18.

1156 BBl 2006 2883.

1.3.3.2. Causality

A natural and adequate causal relationship must exist between the serious violation of supervisory provisions and the financial benefit.[1157] It needs to be assessed whether the serious violation of supervisory provisions resulted in a specific profit or avoided a loss for the respective individual or institution.[1158] The examination of the causality criterion can be challenging in practice. For instance, in cases related to trading activities, FINMA must provide detailed evidence of the specific transactions where the threshold of qualifying for a supervisory violation was surpassed. Additionally, it may be necessary to determine which specific portion of the financial benefit can be directly attributed to the serious violation, as opposed to other causes beyond the control of the wrongdoer, such as market fluctuations, for which the causal link cannot be established.[1159] 374

In most such cases, the confiscation is imposed on the institution. For example, FINMA found a severe violation of BankA 3 II a and c at a bank due to organisational deficiencies and irregularities in its propriety trading department, resulting in the confiscation of unlawfully obtained gains from the institution.[1160] Similarly, in an enforcement proceeding against UBS concerning LIBOR manipulations, it was established that the institution severely violated BankA 3 II a and c due to the manipulation of reference rates by individuals, leading to the confiscation of subsequent profits from the institution.[1161] 375

1.3.3.3. Scope of Confiscation: Profit Earned or Loss Avoided

The supervisory violation must result in a profit gained or a loss avoided. The legislative materials do not provide a specific definition of *profit*.[1162] Generally, under FINMASA 35 I, profit can be understood as the difference between income and expenses during a specific period.[1163] The court practice holds that the focus is on the net profit achieved plus interest. General operating costs are only to be considered insofar as they have increased due to the unlawful 376

1157 Bösch, BSK FINMASA 35 n 24; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 82.
1158 Kuhn, Finanzmarktenforcement, 392.
1159 Bösch, BSK FINMASA 35 n 24.
1160 FINMA, Press Release Incore 19.12.2013.
1161 FINMA, Summary Report LIBOR, 9, 11 et seq.
1162 Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 84.
1163 Bösch, BSK FINMASA 35 n 20.

activities.[1164] Determining the extent of confiscation may prove challenging in practice.[1165] An ongoing question is whether so-called variable components of compensation (bonuses) awarded to responsible individuals in leadership positions can be considered as the profit of an individual and therefore subject to confiscation under FINMASA 35. In theory, it is plausible that systematic violations of supervisory provisions could lead to improved performance, resulting in higher bonuses and thus generating profit for the responsible employee. From this perspective, bonuses theoretically can be seen as profits in the sense of FINMASA 35. However, proving a causal relationship between the violation and the (additional) bonus in practice is presumably difficult, particularly considering the often complex calculation of variable compensation components.[1166] Similarly, FINMASA 35 II covers the *avoided loss*. A loss is understood as the abstractly determined reduction in expenses or liabilities. For instance, a loss could result from a deliberate avoidance of personnel costs that lead to a serious violation of supervisory provisions, giving grounds for a confiscation against the institution.[1167] To determine the amount of confiscation, FINMASA 35 III permits estimation when direct calculation is not feasible or proportionate.[1168] Considering inherent information asymmetries between the institutions and FINMA the practical relevance of such estimations is limited.[1169]

1164 FAC decision B-4757/2017 from 27 February 2020 with reference to FSC decision 2C_422/2018 from 20 March 2019 consid. 2.4 et seq., 3.2.

1165 KUHN, Finanzmarktenforcement, 394.

1166 FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 102; KUHN, Finanzmarktenforcement, 401 et seq. In this context, the instrument must be distinguished from BankA 10a, according to which the Federal Council can impose measures regarding remuneration in SIBs, if the institution receives governmental aid. This was applied in the course of the emergency takeover of Credit Suisse by UBS, see FDF, Press Release, 5.4.2023.

1167 BÖSCH, BSK FINMASA 35 n 23; BBl 2006 2883.

1168 KUHN, Finanzmarktenforcement, 396 et seq. with further references.

1169 ZUFFEREY/CONTRATTO, 152.

2. Organisational Perspective

2.1. Restoration of Compliance with the Law

2.1.1. Content and Function

Turning to an organisational perspective, the instrument of *restoration of compliance with the law* (*Wiederherstellung des ordnungsgemässen Zustands*, FINMASA 31) obliges FINMA to ensure the restoration of proper conditions in the event of violations of the law in order to secure supervisory objectives.[1170] 377

Under FINMASA 31, the supervisory authority is granted broad discretionary powers and authorised to take all measures deemed necessary for ensuring compliance with supervisory statutes.[1171] It allows FINMA to respond to identified deficiencies with a certain degree of flexibility and on a case-by-case basis.[1172] These measures include, in particular, those explicitly provided for in the FINMASA itself (see FINMASA 32-37), as well as the measures outlined in the financial market laws listed in FINMASA 1. Furthermore, FINMA has the entire spectrum of administrative coercion at its disposal. For example, it could issue a mere threat of measures if a deficiency is not rectified, as well as order super-provisional or precautionary measures if there is a risk in delay (e.g. to secure profits).[1173] Generally, FINMA issues a declaratory ruling (cf. APA 5), but it can also employ other informal means if they are sufficient and prove effective.[1174] The boundaries of its actions are determined by the general constitutional principles applicable to all administrative actions, whereby FINMA must apply the mildest of the possible measures in each case.[1175] The broad discretion granted to FINMA in selecting appropriate measures is considered necessary to maintain operability in this partially highly technical field.[1176] 378

1170 BBl 2006 2881; Zufferey/Contratto, 115; Roth Pellanda/Kopp, BSK FINMASA 31 n 2.
1171 Zufferey/Contratto, 114.
1172 Kuhn/Wyss, Finanzmarktenforcement, 360.
1173 Roth Pellanda/Kopp, BSK FINMASA 31 n 6, 7, 9; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 72; see Häfelin/Müller/Uhlmann, n 1440 et seqq. for the administrative sanctions under general administrative law.
1174 Roth Pellanda/Kopp, BSK FINMASA 31 n 15.
1175 Zufferey/Contratto, 115; BBl 2006 2881.
1176 Kuhn/Wyss, Finanzmarktenforcement, 360.

2.1.2. *Personal Scope of Application*

379 In its wording, FINMASA 31 addresses supervised entities, and thereby the question arises whether this instrument can be directly applied to natural persons.[1177] The Federal Supreme Court has established that natural persons holding positions in corporate bodies or individuals in management functions of (unauthorised) institutions can be addressees of orders under FINMASA 31. Given that these persons can also subject to more intrusive instruments, such as the professional ban or a confiscation (FINMASA 33, 35), less intrusive measures must also be applicable in light of the principle of proportionality.[1178] The measures imposed under FINMASA 31 can be directed at the institution itself when the collective responsibility of a governing body is in question, or at the individual directly.[1179] The parties involved in proceedings under FINMASA 31 are the affected institution as the main party and the affected individual.[1180]

2.1.3. *Material Scope of Application*

380 According to FINMASA 31 I, for FINMA to take action, a violation of the FINMASA or a financial market law is required. While the wording is slightly different to the herein discussed further enforcement instruments, which demand a (*serious*) *violation of supervisory provisions*, the used terminology in this norm is however deemed equivalent. Unlike many other instruments, FINMASA 31 does not require that the violation is *serious*.[1181] Alternatively, the instrument can be applied if there are *other irregularities* present. This indeterminate terminology affords FINMA with subsequent discretionary powers. Generally, violations of moral principles, economic principles, or impractical precautions alone do not establish such irregularities. However, gross violations of written codes of conduct, statutes, or regulations can fall under this term. Other irregularities allows for a broader interpretation than the violation of supervisory provisions.[1182]

1177 Roth Pellanda/Kopp, BSK FINMASA 31 n 13a; with reference to Winzeler, BSK BankA 3 n 18; Graf, AJP 2014, 1199; Baumgarten/Burckhardt/Roesch, AJP 2006, 172.

1178 FSC decision 2C_1055/2014 from 2 October 2015 consid. 4.2; Hsu/Bahar/Flühmann, BSK FINMASA 32 n 15; Kuhn/Wyss, Finanzmarktenforcement, 357; Bertschinger, SZW 2021, 747.

1179 Baumgarten/Burckhardt/Roesch, AJP 2006, 172 et seq.

1180 Roth Pellanda/Kopp, BSK FINMASA 31 n 13a.

1181 Kuhn/Wyss, Finanzmarktenforcement, 354; Roth Pellanda/Kopp, BSK FINMASA 31 n 3; for a definition of the violation of supervisory provisions see cf. n 332, 334-338, 341.

1182 Roth Pellanda/Kopp, BSK FINMASA 31 n 5.

2.1.4. *Scope of Consequences*

FINMASA 31 grants FINMA a plethora of possible measures in various forms, whereby the authority must evaluate the appropriate measure in each specific case.[1183] The scope of consequences is best illustrated along practical examples. 381

With regards to the researched context, FINMA can, for example, oblige an institution to make *personnel changes in governing bodies*. This was done in the *Raiffeisen* case, where significant deficiencies in corporate governance were identified. FINMA found that the board of directors failed to fulfil its duties, particularly in overseeing the CEO and ensuring compliance with internal regulations. Notably, there was no disclosure of monitoring of the CEO's personal shareholdings, potentially allowing the former CEO to make personal financial gains at the institution's expense.[1184] This was seen as a severe breach of supervisory provisions, including BankA 3 II a and c.[1185] Recognising personnel changes in the supervisory body which the bank had already initiated, FINMA mandated the institution to further renew it and enhance its professional expertise.[1186] Upon closing the proceeding against the institution, the authority stated it did not have evidence that would justify the opening of procedures against current senior individuals in the bank and postponed its decision on a proceeding after the bank's internal investigation was concluded.[1187] 382

Similarly, *Falcon Bank* was required to strengthen the independence of its board of directors in the aftermath of the 1 MDB scandal.[1188] Furthermore, also 383

1183 Zufferey/Contratto, 115.

1184 FINMA, Press Release Raiffeisen 14.6.2018, 3 et seq.; FINMA, Annual Report 2018, 16, 92 et seq.; see also Gehrig, Untersuchungsbericht Raiffeisen 2019, n 64-71 for a detailed analysis of the failures in management and control mechanisms with regards to the holding transactions. See also n 356 of this thesis for a further discussion of the case.

1185 FINMA, Case Report 2018-06.

1186 FINMA, Press Release Raiffeisen 14.6.2018, 4; FINMA, Case Report 2018-06.

1187 FINMA, Press Release Raiffeisen 14.6.2018, 5. As previously mentioned, the enforcement proceedings against the former CEO were dismissed, as he issued a declaration of resignation, see n 356 of this thesis. The external investigation (which was mandated to evaluate whether corporate bodies had knowledge of the holding transactions) found no evidence that the corporate bodies showed behaviour which allowed for criminal proceedings with regards to the holding transactions, see Gehrig, Untersuchungsbericht Raiffeisen 2019, especially n 52. Still, criminal proceedings were launched against the former CEO.

1188 FINMA, Press Release Falcon 13.10.2016, 3. For further discussions of this case see also of this thesis regarding FINMASA 33: n 344, 351, 356; regarding FINMASA 35: n 372.

under FINMASA 31 obliged *Julius Baer* to establish a committee at supervisory board level specialising in conduct and compliance.[1189]

384 Broad use was made of the instrument with regards to *Credit Suisse*, for example, concerning the bank's "*observation activities*". In this case it was found that the bank conducted seven observations of private individuals (members of the bank's executive body, former employees and third parties) lacking proper risk management processes, internal controls, and documentation. Decision-making for these observations was often informal and without transparent justifications, concealing their backgrounds. After the issue came to light, Credit Suisse's internal review struggled to determine the full extent of these activities and some statements were later found inaccurate. FINMA identified substantial organisational deficiencies within the bank, including leadership issues, inappropriate behaviour, and corporate culture concerns in parts of the executive management. Subsequently, violations of BankA 3 II a and c were found, leading to the instalment of organisational requirements under FINMASA 31. These included setting up an internal reporting system regarding corporate governance topics and requiring corporate bodies' approval for observations to ensure responsibility attribution.[1190]

385 A different approach under FINMASA 31 was taken by FINMA in *Credit Suisse*'s "*Greensill*" case. Credit Suisse started its collaboration with the financier Lex Greensill in 2017 to create supply chain finance funds. However, as was later revealed, the bank had little control or knowledge over these funds. Despite inquiries from various parties, the institution failed to address raised concerns adequately. Rather, it relied on Greensill's information and made inaccurate statements to FINMA regarding the funds' claims selection process and exposure to certain debtors. In one instance, a risk manager raised a number of issues in Greensill's business model and recommended from refraining to grant a loan, but was overruled by a senior manager. In March 2021, Credit Suisse suddenly closed four funds connected to Greensill's companies in the amount of approximately USD 10 billion, raising concerns about their true risk.[1191]

1189 FINMA, Press Release Julius Baer Institution 20.2.2020, 1-3; FINMA, Case Report 2020-01. For a further discussion of this case see also n 353, 395 of this thesis.

1190 FINMA, Case Report 2021-09; FINMA, Press Release CS Observation 20.10.2021, 1-3; FINMA, Annual Report 2022, 61. Also, two individuals were reprimanded in writing, after they provided a declaration of resignation, moreover enforcement proceedings were opened against three individuals, see cited sources and n 356, 395, 382 of this thesis for a further discussion of the case.

1191 FINMA, Press Release CS Greensill 28.2.2023, 1-2; FINMA, Case Report 2022-16.

Consequently, FINMA found severe deficiencies in the bank's organisational structure, leading to measures to improve corporate governance and risk management.[1192] With regards to senior management, the bank was required to document the responsibilities of its top 600 managers and impose sanctions if these individuals fail to prevent misconduct in their area, such as, for example, a reduction of their variable compensation. Furthermore, regular board-level reviews of the top 500 client relationships were also mandated.[1193] After concluding proceedings against the institution, FINMA initiated enforcement procedures against four former managers, whilst not commenting further.[1194] These measures, taken under FINMASA 31, show a close link to the UK's approach under the Senior Managers and Certification Regime (SM&CR).[1195] It is currently unclear whether this measure will also apply to UBS, which took over Credit Suisse shortly after this case emerged. 386

In another case, Credit Suisse incurred over USD 5 billion in losses due to the collapse of hedge fund "*Archegos*" in March 2021.[1196] FINMA overall recognised severe organisational deficiencies and consequently serious and systematic violations of BankA 3 II a. Notably, there was no requirement for proactive addressing of significant and risky business relationships by responsible executive board members. Specific measures imposed were not publicly detailed by the authority, maybe due to the timely proximity of the communications to the Greensill case, where an array of organisational measures was presented. It was however stated that an enforcement proceeding was initiated against an unknown former manager.[1197] Moreover, a separate private investigation by a law firm was mandated by the bank, where various remedial measures were suggested.[1198] The report advocates, *inter alia*, for an overhaul of the bank's leadership in investment bank business and risk management with experienced, capable and competent individuals, and to install accountability mech- 387

1192 FINMA, Press Release CS Greensill 28.2.2023, 1-2; FINMA, Case Report 2022-16.

1193 FINMA, Press Release CS Greensill 28.2.2023, 1-4, especially 3; FINMA, Case Report 2022-16.

1194 FINMA, Press Release CS Greensill 28.2.2023, 3.

1195 Cf. n 233 herein for a discussion of the British approach.

1196 FINMA, Press Release CS Archegos 24.7.2023, 1-2. The losses resulted from the hedge fund's large positions in a few equity securities. The price drop in some of these securities left Archegos without necessary funds to compensate for these losses in value. Given the complex financial arrangement the bank and the hedge fund had, Credit Suisse also had to sell its own investments at a loss.

1197 FINMA, Press Release CS Archegos 24.7.2023, 3.

1198 Credit Suisse Group, Report Archegos, 1, see 31 for an overview on the suggested remedial measures.

anisms for management.[1199] Furthermore, the institution should clearly define roles and responsibilities, as these were previously unclear and blurred.[1200] Both of these cases concerning the then second largest Swiss bank Credit Suisse, "*Archegos*" and "*Greensill*", sparked particular international interest and shed negative light on the Swiss banking sector.[1201]

388 Lastly, it is worth remembering that under this instrument, the consequences of the irreproachability procedure are enacted. If FINMA finds that a relevant person (no longer) provides the guarantee for irreproachable business conduct, it can order the institution to remove the person from the respective function under FINMASA 31.[1202]

2.2. Declaratory Ruling and Substitute Performance

2.2.1. *Content and Function*

389 As another enforcement instrument, the *declaratory ruling and substitute performance* (*Feststellungsverfügung und Ersatzvornahme*) allows FINMA to formally determine that a supervised entity or person has severely violated supervisory provisions through the issuance a declaratory ruling according to FINMASA 32 I. However, it can only do so subsidiarily, meaning if there are no further measures required to restore compliance with the law, either because the violation has been rectified or because it is not of a continuous nature. If the declaratory ruling does not follow suit, FINMA may perform the required act itself or have it performed at the expense of the defaulting party (cf. FINMASA 32 II).[1203]

390 Given the public interest in the comprehensive observance of all supervisory provisions, the Federal Gazette recognises the punitive character of this in-

1199 Credit Suisse Group, Report Archegos, 154 et seq.

1200 Credit Suisse Group, Report Archegos, 156.

1201 E.g. these cases were also noted in the IMF, Switzerland Country Report 2021 no. 21/130, n 10, briefly mentioning its sizable losses in these cases and that the institution has overhauled management and raised capital.

1202 Roth Pellanda/Kopp, BSK FINMASA 31 n 13a; with reference to Winzeler, BSK BankA 3 n 18; Graf, AJP 2014, 1199; Baumgarten/Burckhardt/Roesch, AJP 2006, 172; cf. also n 364 of this thesis.

1203 Zufferey/Contratto, 117; Hsu/Bahar/Flühmann, BSK FINMASA 32 n 1, 8, 24; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 77; Kuhn/Wyss, Finanzmarktenforcement, 353 et seq. See e.g. Beck, n 373 et seq. for the delineation to the similar instrument in APA 25.

strument.[1204] As the tool aims to determine a serious breach of supervisory provisions, rather than restoring lawful conditions, it is considered a repressive administrative measure. It has a preventive effect by deterring supervised entities from committing breaches of duty.[1205] Furthermore, it serves the public interest in ensuring compliance with all prudential rules.[1206]

The declaratory ruling, often referred to as a *ruling*, represents the weakest enforcement instrument under FINMASA.[1207] It must be distinguished from informal ruling letters that the FINMA occasionally uses as part of its supervisory activities. It may issue such a letter if, for example, the supervisory violation in question is not severe or if the criteria for initiating formal proceedings are not met.[1208] Again, the identification of the use of FINMASA 32 in practice is difficult, given the restraints on FINMA's communication. Moreover, the terminologies used varies and is inconsistent. This often makes it impossible to determine whether the measure imposed was a declaratory ruling in the sense of FINMASA 32 or a mere informal ruling letter (also: reprimand).[1209] 391

2.2.2. *Personal Scope of Application*

FINMA's authority to issue such rulings is generally limited to persons subject to supervision (cf. FINMASA 3) and FINMASA 32 explicitly refers to *supervised entity* or *person* as possible violators.[1210] However, corporate bodies and individuals in management positions of supervised institutions are generally viewed as exception to this principle and are acknowledged as possible addressees of the declaratory ruling, similar as in the instrument of the restoration with the law under FINMASA 31.[1211] 392

1204 BBl 2006 2881.

1205 Hsu/Bahar/Flühmann, BSK FINMASA 32 n 11, with reference to BBl 2006 2849; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 75.

1206 Zufferey/Contratto, 117; Kuhn/Wyss, Finanzmarktenforcement, 354.

1207 Hsu/Bahar/Flühmann, BSK FINMASA 32 n 2, 9; Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 75.

1208 Kuhn/Wyss, Finanzmarktenforcement, 359.

1209 E.g. as just one example of many, the communications regard Credit Suisse's observation activities. In the Press Release it was stated that two individuals were reprimanded in writing (original German wording: *schriftlich gerügt*), in the annual report it was stated that these individuals received a dismissal order (original German wording: *Abschreibungsverfügung*), cf. FINMA, Press Release CS Observation 20.10.2021, 1, 3; FINMA, Annual Report 2022, 61.

1210 Hsu/Bahar/Flühmann, BSK FINMASA 32 n 14.

1211 FSC decision 2C_1055/2014 from 2 October 2015 consid. 4.2; Hsu/Bahar/Flühmann, BSK FINMASA 32 n 15; Kuhn/Wyss, Finanzmarktenforcement, 357; Bertschinger, SZW 2021, 747; regarding FINMASA 31 see n 379 of this thesis.

2.2.3. *Material Scope of Application*

393 The issuance of a declaratory ruling requires a serious violation of a supervisory provision.[1212] In the context of this instrument it was held that a single, isolated minor breach of supervisory provisions is not sufficient.[1213] FINMA utilises the instrument in particular to address instances of legal breaches that go beyond ordinary operational incidents and management errors.[1214] It is also necessary that the violation was causally and culpably caused. Some raised the question, whether in light of the protection of creditors and the general central role of trust in the banking sector, whether it would be more appropriate to substitute the criteria of seriousness with a simple violation of supervisory law (as required in FINMASA 31).[1215] Yet it is worth noting that already in the current setup, a certain severe violation of supervisory provisions may indeed warrant the issuance of a declaratory ruling under FINMASA 32, while the same violation might not necessarily allow for more intrusive supervisory instruments to be imposed (e.g. a professional ban).[1216]

394 For example, the instrument was used in a case where FINMA found a foreign exchange spot trader in a leading position as significantly responsible for severe violations of BankA 3 II a and c by the institution. As the incident occurred some time ago and the individual resided abroad with no intent to return to Switzerland, issuing a declaratory ruling establishing the serious supervisory violations was deemed sufficient.[1217] In addition, in the previously discussed case of failure of a bank's supervisory board to act appropriately upon privileged information with significant financial repercussions for the bank the instrument was imposed. Regarding one individual in this case, only a declaratory ruling was issued, opposing the professional bans imposed on his former colleagues, as the supervisory authority found mitigating circumstances in this particular case.[1218] In addition, in another case it was found that a former member of the executive management of a bank did not critically analyse the information he was confronted with regarding risky business relationships.

1212 FRIEDMANN/KUHN/SCHÖNKNECHT, Finanzmarktaufsicht, § 12 n 76; for a definition of the serious violation of supervisory provisions see n 332-341 of this thesis.

1213 FSC decision 2C_1055/2014 from 2 October 2015 consid. 4.2.

1214 HSU/BAHAR/FLÜHMANN, BSK FINMASA 32 n 21.

1215 BERTSCHINGER, SZW 2021, 748.

1216 KUHN/WYSS, Finanzmarktenforcement, 355.

1217 FINMA, Case Report 2019-13; see also KUHN/WYSS, Finanzmarktenforcement, 356.

1218 FINMA, Case Report 2016-10; see also FAC decision B-5522/2016 from 10 July 2019, which upheld FINMAs decision. See also n 346, 352 of this thesis for a further discussion of the case.

Thereby, incomplete, contradictory, or critical data was accepted and a passive behaviour was demonstrated, inconsistent with prudential requirements for a person in his position. Through his serious omissions, the manager allowed and facilitated severe violations of anti-money laundering regulations as well and the bank was found to have violations of BankA 3 II a and c. Thereby, FINMA issued a declaratory ruling against the former senior manager and in the same matter, *inter alia*, issued four reprimands (*Rügeschreiben*).[1219]

Further examples, where individuals were merely reprimanded in writing, constitute the case of *Credit Suisse*'s "*observation activities*", where two individuals were issued reprimands after they provided a declaration of resignation.[1220] Similarly, in the previously discussed *Julius Baer* case, where FINMA noted the difficulty to prove individual responsibility for the significant organisational deficiencies, two former managers were also reprimanded.[1221] This in turn could imply that FINMA was unable to meet the higher threshold regarding the severity of the supervisory violation and the individual attribution of, for example, the issuance of a declaratory ruling or even the imposition of a professional ban.[1222] Lastly, it is worth noting that in practice, institutions often voluntarily part ways with individuals following the issuance of a declaratory ruling.[1223] 395

2.2.4. *Scope of Consequences*

With the issuance of a declaratory ruling it is officially determined that the addressee has severely violated supervisory provisions.[1224] As previously mentioned, a declaratory ruling is only issued when no further measures are required to restore compliance with the law.[1225] The issuance of such a ruling 396

1219 FINMA, Case Report 2020-02; FINMA, Press Release BSI Reassessment 22.10.2020; see also FINMA, Press Release BSI Opening 24.5.2016, 1-4. Furthermore, FINMA imposed two professional bans, which were appealed and refrained from imposing another one following the persons declaration of resignation, see cited sources.

1220 FINMA, Press Release CS Observation 20.10.2021, 1, 3; FINMA, Annual Report 2022, 61; see also n 356, 384, 382 of this thesis for a further discussion of the case.

1221 FINMA, Press Release Julius Baer Managers 21.1.2021, 1-2; FINMA, Press Release Julius Baer Institution 20.2.2020, 1-3. A further enforcement proceeding against an individual was opened and another one was closed as a declaration of resignation was provided. For a further discussion of this case see also n 353, 383 of this thesis.

1222 Cf. Bertschinger, SZW 2021, 745, 747 with a similar view.

1223 Kuhn/Wyss, Finanzmarktenforcement, 356.

1224 Hsu/Bahar/Flühmann, BSK FINMASA 32 n 7.

1225 Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 79; Kuhn/Wyss, Finanzmarktenforcement, 356.

does not preclude the fact that more intrusive supervisory measures were imposed prior. Moreover, in cases where a person is removed from a supervised institution or when a confiscation is imposed, FINMA routinely confirms the severe supervisory violation formally through a declaratory ruling.[1226] Nevertheless, there are instances where no room remains for additional measures, and these cases are concluded solely with this instrument.[1227]

2.3. Publication of the Supervisory Ruling

2.3.1. *Content and Nature*

397 In cases of serious violation of supervisory provisions, the *publication of the supervisory ruling* (*Veröffentlichung der aufsichtsrechtlichen Verfügung*) in FINMASA 34 I allows the authority to publish its final ruling in electronic or printed form once it takes full legal effect, disclosing personal data (often also referred to as naming and shaming).[1228] In practice, the instrument is almost exclusively used for the publication of rulings imposing prohibitions against natural persons who engage in unauthorised financial market activities.[1229] The currently limited use of this instrument (in connection with the restrictions of FINMA's communication activities in general) constituted also a topic suggested for further review by the expert group on banking stability following the emergency takeover of Credit Suisse by UBS in March 2023.[1230] Even if in its present use, the instrument is of limited relevance for the herein context, it is still worth briefly discussing it. Thereby, a conclusive overview of all available instruments is gained. In addition, it is not generally precluded that the instrument could possibly be applied more broadly and hence also in the context of the present research.

1226 Zufferey/Contratto, 117; BBl 2006 2881.

1227 Friedmann/Kuhn/Schönknecht, Finanzmarktaufsicht, § 12 n 79.

1228 BBl 2006 2883; FINMA, Communication Policy, 10; Hsu/Bahar/Flühmann, BSK FINMASA 34 n 1; Zufferey/Contratto, 135. A such publication must be distinguished from further communication of FINMA regarding enforcement proceedings, see n 318-321 of this thesis.

1229 FINMA, Communication Policy, 10; Kuhn, Finanzmarktenforcement, 386; Nobel, § 5 n 169; Hsu/Bahar/Flühmann, BSK FINMASA 34 n 12a, 22 who in n 23 note an exception of a case concerning Bank Leumi, see cited reference for details.

1230 Expertengruppe Bankenstabilität, Report 2023, 58, 65, 81. See also fn 376 and n 6 of this thesis for a further discussion of the report, see n 318-321 for a discussion of the communication limits.

The measure is based on the idea that the threat of publication with the naming of institutions or individuals and the associated damage to their reputation acts as a deterrent from committing serious breaches of supervisory provisions. By sanctioning the committed wrongdoing, it also serves a repressive effect.[1231] Given that it is mainly used to inform about people's unauthorised financial market activities, some attribute the instrument an informative aspect in the sense that it warns potential investors. Others do not see its purpose in informing the public, but rather in the restoration of compliance with the law.[1232] The publication of the ruling constitutes a significant infringement of personal rights and, therefore, a careful balancing of the affected interests must be conducted.[1233] 398

2.3.2. *Personal Scope of Application*

Supervised entities according to FINMASA 3 are seen as the main addressees of the instrument, as they can be targeted by final rulings concerning serious violations of supervisory provisions. Moreover, the literature considers the instrument applicable to cases of professional bans (cf. FINMASA 33) and also for governing bodies of financial institutions. However, it is essential to note that these statements were made with reference to court decisions which determine the personal applicability of this instrument for the group of individuals in the context of unauthorised institutions or activities.[1234] As far as is apparent, the supervisory authority and/or the courts have yet to decide whether this would also apply to individuals of supervised institutions, as relevant in the herein context. 399

1231 Hsu/Bahar/Flühmann, BSK FINMASA 34 n 8 et seq.; Zufferey/Contratto, 129-131; Kuhn, Finanzmarktenforcement, 385; Nobel, GesKR 2009, 62; cf. also e.g. FSC decision 2C_1055 from 2 October 2015 consid. 4.2.

1232 See Nobel, § 5 n 169 who identifies the warning aspect, whereas Hsu/Bahar/Flühmann, BSK FINMASA 34 n 9 deny an informative objective.

1233 Hsu/Bahar/Flühmann, BSK FINMASA 34 n 13a, 17, see n 13b - 13d for a detailed discussion of the principle of proportionality in this context see Zufferey/Contratto, 135; Nobel, § 5 n 169; for the principle of proportionality in general see fn 795 of this thesis. According to the cited sources, limitations to the publication of decisions disclosing personal data constitute the protection of fundamental rights (such as the constitutional right to privacy which includes the right to protection against the misuse of personal data in FCSC 13 and the right to personal freedom in FCSC 10 II) and data privacy rights, as well as the official secrecy according to FINMASA 14.

1234 Kuhn, Finanzmarktenforcement, 386, who refers to FSC 147 I 57 consid. 4; Hsu/Bahar/Flühmann, BSK FINMASA 34 n 11, who refer to FAC decision 2C_305/2016 from 24 November 2016 consid. 2.3.1, 2.3.2; cf. FSC decision 2C_1055/2014 from 2 October 2015 consid. 4.2-4.3.

2.3.3. *Material Scope of Application*

400 As with other measures, the *severe violation of supervisory provisions* is a prerequisite for the publication of a supervisory ruling.[1235] Since this instrument constitutes a substantial interference with the individual's constitutional rights, a single, isolated, and minor breach of financial market obligations is not sufficient.[1236] In light of the severe infringement with personal rights of the affected, the publication of an order under FINMASA 34 requires a more serious violation than issuance of a declaratory ruling under FINMASA 32.[1237]

401 Furthermore, the published order must be the *final ruling* of FINMA, meaning that it has attained full legal force and effect.[1238] Furthermore, the publication must be foreseen by an explicit notice in the ruling itself (FINMASA 34 II) and thereby making it appealable and subject to judicial review.[1239] While FINMASA 34 does not specify the types of final decisions that can be published, examples constitute the publication of a declaratory ruling (FINMASA 32) or the revocation of a license, recognition, authorisation, or registration (FINMASA 37).[1240] Furthermore, some argue that the publication of orders related to professional bans (FINMASA 33) or confiscation (FINMASA 35) could also be possible.[1241]

2.4. Revocation of the License

402 As a last enforcement instrument from an organisational perspective, the *revocation of the license* (*Entzug der Bewilligung, der Anerkennung oder der Zulassung*) according to FINMASA 37 in connection with BankA 23^{quinquies} is

1235 HSU/BAHAR/FLÜHMANN, BSK FINMASA 34 n 11; ZUFFEREY/CONTRATTO, 133; for a definition of the serious violation of supervisory provisions see also n 334-341 of this thesis.

1236 HSU/BAHAR/FLÜHMANN, BSK FINMASA 34 n 14b; cf. e.g. also FSC decision 2C_1055 from 2 October 2015 consid. 4.2.

1237 HSU/BAHAR/FLÜHMANN, BSK FINMASA 34 n 14d.

1238 ZUFFEREY/CONTRATTO, 134. A final ruling conclusively defines a legal relationship. This is the case when the appeal period for challenging the decision has elapsed unused; when a court has rendered a final judgment on the appeal; or when the party entitled to appeal has validly waived the right to appeal after the issuance of the decision, see HSU/BAHAR/FLÜHMANN, BSK FINMASA 34 n 15.

1239 HSU/BAHAR/FLÜHMANN, BSK FINMASA 34 n 16a; BBl 2006 2883.

1240 BBl 2006 2883, who names these two instruments as examples, thereby not excluding further.

1241 HSU/BAHAR/FLÜHMANN, BSK FINMASA 34 n 16; cf. also ZUFFEREY/CONTRATTO, 134 with a similar view, see also the latter authors, 147, where the possibility of the publication of a professional ban is mentioned.

worth noting. Accordingly, FINMA is authorised to revoke an institution's license when one or more licensing conditions are no longer met or when an institution severely breaches supervisory provisions.[1242] This measure is legally qualified as the withdrawal of an approval or ruling, which requires a prior balancing of interests.[1243] The function of the instrument is to safeguard the interests of creditors and depositors, as these should not be harmed from banks which do not adhere to requirements, such as, for example, regarding capital or liquidity.[1244] However, it is deemed the *ultima ratio* of all measures, and naturally, high demands are placed on the principle of proportionality.[1245] Alternatives constitute, for example, a preceding supervisory intervention by issuing rulings or a conditional revocation.[1246] If, however, the license is revoked, the inevitable consequence for the institution is its liquidation (BankA 23^{quinquies}).[1247]

Applied to the herein relevant issues regarding organisational or personnel requirements can certainly pertain to the point where at least one licensing requirement is not met anymore, or (as previously learned) constitute a severe violation of supervisory provisions. However, the application of the revocation of the license is rare or virtually non-existent in the context of systemically important banks. While no specific measures against senior management are foreseen in this instrument, the natural course of things would be the job-loss of a senior manager. Depending on the circumstances that led to the revocation of the license, the imposition of further enforcement instruments on senior management is theoretically also possible if a (severe) supervisory violation can be attributed to the individual (such as e.g. a professional ban according to FINMASA 33).[1248] 403

1242 Roth Pellanda/Kopp, BSK FINMASA 37 n 12-19; Poledna/Jermini, BSK BankA 23^{quinquies} n 8 et seq.; Kuhn/Wyss, Finanzmarktenforcement, 411 et seq., see also the latter for two examples where the license was revoked from banks.

1243 Roth Pellanda/Kopp, BSK FINMASA 37 n 8, 21 et seq.; Poledna/Jermini, BSK BankA 23^{quinquies} n 10 et seq.

1244 Poledna/Jermini, BSK BankA 23^{quinquies} n 3.

1245 Zufferey/Contratto, 116.

1246 Poledna/Jermini, BSK BankA 23^{quinquies} n 8.

1247 Kuhn/Wyss, Finanzmarktenforcement, 411; Poledna/Jermini, BSK BankA 23^{quinquies} n 13; Roth Pellanda/Kopp, BSK FINMASA 37 n 24.

1248 Cf. n 328 et seqq. herein for a discussion of the professional ban.

II. Results

404 Financial market supervisory law has traditionally intended to achieve its protective goals through a preventive effect. It is however generally recognised that if issues arise, the supervisory authority must have instruments at hand to intervene. With regards to Swiss financial market law, such instruments are discussed under the term *enforcement*. Other than the preceding phases of authorisation and ongoing supervision, which constitute the natural and mandatory course of a supervisory law life cycle, this phase is not inevitable but is only evoked in cases of (potential) violations of supervisory law. In line with the researched scope of the present work, the preceding analysis sought to reveal what and how instruments can be imposed on senior management of Swiss banks in the context of violations of BankA 3 II a and c and their accompanying provisions. Thereby, an understanding should be fostered on how the senior management of banks can be held accountable for infringements of the relevant provisions and how it is ultimately seen as responsible for the prudential corporate governance framework.

405 In addition to presenting the respective substantive law, the analysis sought to examine the practical application of enforcement instruments to the herein relevant context. This necessitated a review of pertinent documentation from both FINMA and judicial decisions. It was thereby found that as a general principle, the supervisory authority is not allowed to *communicate* on specific cases. Exceptions are possible to address supervisory needs, correct misinformation, and preserve the Swiss financial market's reputation. A diminishing quantity and quality of information concerning enforcement proceedings over time was observed, which is opposed to the commitment to maximal transparency of the supervisory authority. With the current setup, the broadly formulated case descriptions seldomly furnish the nuanced considerations necessary to understand why a certain measure was imposed or not. This would be especially relevant to understand how the individual and institutional mechanisms interact. In addition, the limits on communication pose an impediment to market participants seeking to discern conduct standards and comprehend supervisory expectations, especially in light of the evolving principle-based nature of FINMA-Circulars. Similarly, it restrains academic discussion and potentially limits subsequent developments. Lastly, the limits of communication also posed a notable constraint on the depth and outcomes of the analysis.

Upon reviewing the array of available instruments, the *dual-perspective strategy* of regulating and supervising the senior management of banks through an organisational and personnel perspective persists in enforcement. However, a subtle nuance was found. Enforcement introduces instruments that can be directly levied upon natural persons, thus affording a more distinctly delineated *personal* rather than a *personnel* perspective. Moreover, senior management can also be profoundly affected by instruments imposed on the institution. Unlike many international counterparts, FINMA does not have the authority to impose fines. The lack of this instrument was also noted by the IMF, which questioned the dissuasiveness of current measures. Nationally, vesting FINMA with such an instrument has been a subject of ongoing political controversy. Recently, it was found that incorporating monetary administrative sanctions against *institutions* into the existing system should technically be feasible through some legal adjustments. Whether this would also apply to *individuals* is currently left open. 406

In the context of the pertinent *personal* scope of this research, it was found that there are no specific formal instruments which explicitly address senior management. Still, theoretically, senior management can be affected by all examined instruments. Besides the instruments directed at the bank, certain instruments generally target individuals in leadership functions (cf. FINMASA 33, 35) and thereby also senior management. In the same manner, the analysis identified the irreproachability procedure as an established mechanism for addressing concerns relating to individuals who must provide the guarantee for irreproachable business conduct, although it is not formally foreseen as a such instrument in a financial market act. 407

Within the relevant *material* scope of research, BankA 3 II a and c, including the accompanying provisions in BankO (especially BankO 11), as well as FINMA-Circ. 17/1 are acknowledged as supervisory provisions in this context. A nuanced practice with regards to violations of FINMA-Circ. 17/1 could not be identified; instead, such violations in practice are technically attributed to BankA 3 II a and c as legal bases of the Circular. Nearly all instruments mandate a *serious* (also: severe) violation of supervisory provisions, exceptions constitute the irreproachability procedure and FINMASA 31, which do not require a qualified seriousness, and for the latter even a mere *irregularity* is sufficient. Nevertheless, the analysis discerned that the interpretation of seriousness varies, as it is relative to the level of infringement of the instrument at hand. Concerning senior managers, it was thus established that the requisite level of seriousness is highest when imposing a professional ban or a confiscation (considered as most intrusive measures for the affected person) and com- 408

paratively lower for the issuance of a declaratory ruling. Consequently, the analysis revealed that while there exist no instruments which explicitly target senior management, these individuals can theoretically be held responsible for (serious) violations of BankA 3 II a and c through all examined instruments. While it is mostly required that a *serious* violation occurred, the threshold of seriousness is relative to the level of infringement of the relevant tool.

409 The practical examination based on the available documentation revealed that senior management is *only very seldomly* seen as directly responsible for violations of the herein relevant organisational and/or personnel licensing requirements of banks. For example, in analysing the personal instruments (cf. FINMASA 33 and 35), only a few cases could be identified which encompass a *direct* violation of the organisational or personnel requirements by senior managers. Rather, it was observed that if a person breached further legal statues, such as if the senior manager was involved in infringements of anti-money laundering provisions, she was conclusively also found responsible for the ensuing breaches of the organisational and/or personnel requirements. In such scenarios, the imposition of the most stringent measures, such as the professional ban, was sometimes possible. The analysis of the professional ban moreover revealed that within the herein relevant scope of research it is often difficult to establish a direct causal link between a senior manager's misconduct and the violation of supervisory law provisions, especially in complex organisational structures.

410 As opposed to attributing the direct responsibilities to senior management individuals, the analysis found violations of BankA 3 II a and c were often *attributed to the institution*. The prevalence of institutional attribution was underscored in analysing the instrument of *restoration of compliance with the law* (cf. FINMASA 31), where numerous cases of violations of the pertinent norms were found. While technically targeted at institutions, the measures enforced under this instrument often had noteworthy repercussions for senior managers. In addition, there were some cases identified where (former) management of banks were issued subject to a declaratory ruling under FINMASA 32, following the identification of a bank's violation of the organisational and/or personnel requirements. This observed practice is insofar not surprising as FINMASA 31 does not require a qualifying severity (an irregularity suffices) of the supervisory violation. In addition, the severity required in FINMASA 32 is relatively lower than, for instance, a professional ban (as elaborated above). Additionally, FINMA has publicly expressed that attributing a (serious) violation of supervisory law to individuals often poses a major hurdle in the practical application of the instruments. Whether the herein discussed practice reflects

the deliberate primary choice of the supervisory authority or rather serves as a contingency in light of the expressed difficulty remains unclear, given the scarce publication practice. In summary, the analysis of the available documents indicates that violations of the organisational and personnel requirements are mostly only directly attributed to senior management if there is additional breach of law present, which is also a violation of BankA 3 II a and c and can be established. In most of the analysed cases, a violation of these norms was attributed to the institution, yet still with potentially far-reaching implications for senior managers.

411 The actual *consequences* for senior managers were found to be as follows: if through an *irreproachability procedure* it is denied by FINMA that the person provides the guarantee for irreproachable business conduct, the person must be removed from her position and potentially faces restrictions for assuming another for some time. Alternatively, the institution might choose to sever ties with the individual; or often affected individuals opt for voluntary withdrawal from their positions. Furthermore, in the case of a *professional ban* (cf. FINMASA 33), the person is prohibited from holding a managerial position for defined period (with a maximum of five years), leading to removal of the person if she still occupies a such role. A similar effect transpires if, during the procedure, the individual voluntarily commits to refraining from taking on a management position in the financial industry and FINMA accepts such a declaration of resignation. Under the *restoration of compliance with the law* (cf. FINMASA 31), a spectrum of measures can be imposed, including the renewal of the corporate bodies, or the removal of a senior manager or the installation of additional control mechanisms. These can all undoubtedly have a significant impact on governing bodies and, again, often lead to the removal of a senior management individual. While the *declaratory ruling* (cf. FINMASA 32) primarily asserts the identification of a severe violation of supervisory provisions, it is found that the institution is likely to part ways with the implicated individual. Ultimately, the loss of the respective position of a senior manager would also be the logical consequence of the *revocation of the license* (cf. FINMASA 37). Technically, only the professional ban or the irreproachability procedure can impose an official restriction on a person from holding or assuming a certain position. Yet, as just illustrated, many other instruments potentially have the same effect. Moreover, while not officially banned, it remains questionable whether FINMA would approve a person previously implicated by one of these instruments for an irreproachability guarantee position.

412 A distinctive *consequence* derives from the *confiscation* (cf. FINMASA 35), wherein profits earned or losses avoided can be confiscated, including those from individuals in a management function. The analysis of FINMASA 35 in the examined context found that it would theoretically be possible to confiscate variable components of senior management remuneration. Whilst seemingly feasible in theory, the practical implementation of this scenario poses challenges, as FINMA would need to substantiate the exact portion of compensation attributable to the severe supervisory law violation. In addition, the instrument of *publication of the supervisory ruling* (cf. FINMASA 34) is in theory seen to be applicable to senior managers of banks, although, as far as can be ascertained, it has not been imposed accordingly to date (and also not in the broader context of the herein research scope). With regard to consequences for senior management, the analysis revealed that whilst senior management can be theoretically impacted by all of the researched instruments, the effective consequence is mostly loss of the job. Two of the researched instruments, the confiscation and publication of the supervisory ruling, constitute the exception to this finding. It was found that these instruments were presently not being used to their full extent.

413 In summary, the analysis based on the available documentation indicates that, theoretically, senior managers can be held accountable for violations of BankA 3 II a and BankA 3 II c and their accompanying provisions and consequently would imply a reciprocal influence with corporate governance. However, in practice, there is a clear tendency of attributing such violations to institutions.

III. Emerging Approaches

A. United Kingdom

With regards to enforcement under the British Senior Managers and Certification Regime (SM&CR), the starting point constitutes the previously elaborated key feature of this setup, namely the formal attribution of responsibilities. This attribution is realised through the statement of responsibilities (SoR) and the management responsibilities map (MoM). These documents must be submitted to the authorities in the course of the authorisation process and must be continuously held up to date. Of particular relevance for the herein context is the SoR. It outlines which aspects a senior manager is responsible for.[1249] The respective senior manager then has a *duty of responsibility* for the areas assigned in her SoR.[1250] 414

Consequently, in the aftermath of a misconduct incident within a firm, regulatory authorities possess the authority to scrutinise the submitted documents, and hence the SoRs (and also the MoM) to identify the responsible senior manager. Given the senior manager's duty of responsibility, accountability may be established for the designated areas. However, the ensuing criteria must be satisfied: Firstly, the regulator must substantiate a breach by the firm of its obligations in a domain for which the senior manager bears responsibility; secondly, it must be demonstrated that the pertinent senior manager failed to undertake reasonable steps to prevent the breach from transpiring or persisting. If these prerequisites are fulfilled, the regulator is empowered to initiate legal proceedings against the aforementioned senior manager for infringing her duty of responsibility.[1251] The duty of responsibility accordingly does not necessarily require that a person holding a senior management function has (in- 415

1249 See n 233-235 of this thesis for the instalment during the authorisation phase.

1250 ALLEN, BoE Bulletin Q3 2018, 12; SHALCHI, UK House of Commons Library Briefing 2021, 12; cf. PRA, SS28/15, n 2.59-2.67.

1251 CHIU/WILSON, 520 et seq.; ALLEN, BoE Bulletin Q3 2018, 12; FSMA 2000 ss 66, 66A(5) and 66B(5); see also CHIU/WILSON, 521 for a discussion of the terminology reasonable steps. It is worth noting that initially it was foreseen that under the SM&CR there would be a reversed burden of proof and the person in question would be considered guilty, unless he could show that he took all steps that a person in his position could be reasonably expected to take to prevent the misconduct in question. This was, however not implemented accordingly, see e.g. KOKKINIS, Corporate law, 128, 135.

tentionally or negligently) directly committed a legal violation or was involved in one. Consequently, vigilance becomes a duty and turning a blind eye can constitute a breach of duty.[1252]

416 It was also previously elaborated that senior managers have to adhere to *rules of conduct*.[1253] In cases of breach of these conduct rules by an individual the authorities are empowered to impose sanctions.[1254] Personal culpability is necessary for a breach of any of the conduct rules. This means that a person's conduct must have been either deliberate, or the person's standard of conduct was below that which would be reasonable in consideration of all the circumstances.[1255] When assessing compliance or breach of a conduct rule, factors and the context of the conduct in question will be evaluated. These include the precise circumstances of the individual case, the characteristics of the particular function performed by the person in question, as well as the expected behaviour in that function.[1256]

417 The authorities are granted several disciplinary powers against an approved individual under the SM&CR: imposition of a financial penalty in an amount considered appropriate; suspensions from performing a particular senior management function for a maximum of two years; imposing conditions on the individual (also for a maximum of two years); or publish a statement on the misconduct.[1257] Furthermore, a criminal offence was introduced relating to decisions causing a bank failure, the so-called reckless banking provision. Accordingly a senior manager can be punished by imprisonment for up to seven years and/or an unlimited fine.[1258] It requires that the bank the individual is working for (or has worked) failed; and that the individual in question has knowingly taken a decision for the institution, being aware that a risk or failure could ensue, and in so doing has fallen below the standard of a comparable reasonable person.[1259] Under the general process, the affected person is al-

1252 EMMENEGGER, AJP 2022, 829.

1253 See n 237-239 of this thesis.

1254 KOKKINIS, Corporate law, 129; PRA, SS28/15, n 2.65; FSMA 2000 ss 66-67; more specifically see FSMA 2000 ss 66A(2), 66B(2) for the failure to comply with the authorities rules and FSMA 2000 ss 66A(3), 66B(3) for the contravention of a relevant requirement, cf. FSMA 2000 ss 66A(4), 66B(4) for the definitions of relevant requirement.

1255 PRA, SS28/15, n 5.8; see also EMMENEGGER, AJP 2022, 828; FSMA 2000 s 66(1)(a).

1256 PRA, SS28/15, n 5.7.

1257 FSMA 2000 s 66(3); EMMENEGGER, AJP 2022; CRANSTON ET AL, 153, 157 et seq.

1258 KOKKINIS/MIGLIONICO, 245; FSMA 2000 s 36.

1259 CHIU/WILSON, 521.

lowed to appeal to the Upper Tribunal. It can review the substance of the decision of the competent authority and a further appeal is allowed to the Court of Appeal, solely on questions of law.[1260]

B. The Netherlands

As previously mentioned, the supervision of behaviour and culture in the Netherlands focuses on ongoing supervision and seeks to mitigate potential risks in a forward-looking manner. There is no specific enforcement procedure foreseen with regards to the behaviour and culture supervision.[1261] However, if the novel methodologies reveal a misconduct which qualifies as a supervisory law violation, the authorities may impose one of the general enforcement instruments they have at their disposal.[1262] The DNB and AFM wield a diverse array of formal enforcement instruments against both the individuals and the institutions, which encompass measures such as: issuing instructions; disqualifying individuals from specific functions for defined durations; imposing orders subject to penalties; imposing administrative fines; or modifying or restricting licenses.[1263] The calculation of the amount of an administrative fine depends on the severity of the violation. Accordingly, the Financial Supervision Act (FSA) foresees three different categories, with fines generally ranging from EUR 10'000 to EUR 5'000'0000, however also allowing for a certain flexibility by which such can be adjusted upwards to EUR 20'000'000, but also downwards.[1264] 418

The Dutch financial market supervisory authorities are generally obligated by law to publicly disclose decisions regarding the imposition of administrative sanctions once the decision has become final. This disclosure serves various purposes, including providing insights into the enforcement practices of regulatory authorities, informing and warning market participants, and con- 419

1260 KOKKINIS, Corporate law, 129; FSMA 2000 s 67, especially (7).

1261 See n 122-133 herein for an overview on the model.

1262 See n 132 herein.

1263 AFM/DNB, Handhavingsbeleid, 6. The difference between the two monetary sanctions is as follows: the *order subject to penalty* at first installs deadline, by which the affected person must remedy or end an offence. If she fails to do so, the fine is imposed (thereby a conditional obligation). The *administrative fine* constitutes a classic unconditional obligation to pay a sum of money without a further grace period.

1264 Cf. FSA 1:8, 1:81, including their appendixes, as well as Decree on Administrative Fines in the Financial Sector (*Besluit bestuurlijke boetes financiële sector*) and DNB, general fine calculation policy (*Algemeen boetetoemetingsbeleid DNB*) which set forth how the amount of the fine must be calculated.

tributing to both general and specific prevention. Complete public disclosure is the basic principle, also for instruments imposed against individuals. Anonymisation, delay, or the omission of disclosure is only permissible if explicitly specified grounds in the relevant supervisory law apply. For instance, such exceptions may be invoked if public disclosure would disproportionately harm the involved parties or jeopardise the stability of the financial system.[1265]

420 Besides the classic financial market enforcement for breaches of supervisory law, the Netherlands has established a separate institution to pursue violations against the banker's oath and the associated conduct rules. While not solely or specifically directed at senior management, it is worthwhile briefly outlining this aspect of the Dutch approach.[1266] The Dutch Banking Association (*Nederlandse Vereniging van Banken*, NVB) has set up an independent "Foundation for Banking Ethics Enforcement" (FBEE, *Stichting Tuchtrecht Banken*). The FBEE established the world's first (semi) private statutory disciplinary board for the banking sector in 2015, the so-called "Dutch Banking Disciplinary Committee" (DBDC, *Tuchtcommissie Banken*). It aims at assessing whether an individual has complied with the conduct rules and banker's oath that apply to the employees of the banking sector and can enforce its compliance.[1267] Proceedings have to adhere to the "Disciplinary Code for the Banking Sector", established by the FBEE, which sets forth rules and details of the procedure.[1268]

421 Disciplinary proceedings before the DBDC are instituted by means of a complaint which can be filed by anyone. Most of these come from bank customers, but institutions themselves can also file against their employees.[1269] The complaint is filed with the FBEE which then decides whether it is admissible and whether to submit a complaint to the DBDC.[1270] If the latter reaches the verdict that the conduct rules have been violated, it can (but is under no obligation to do so) impose one or more of the following measures: a disciplinary measure in the form of compulsory education; a reprimand; a fine up to EUR 25'000

1265 AFM/DNB, Handhavingsbeleid, 7.

1266 See n 240-242 herein for a discussion on the banker's oath and the conduct rules.

1267 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.03, 18.10; Soeharno, JIBLR 2021, 136.

1268 See FBEE, Disciplinary Code. The contents are structured along the following titles: 1 Definitions; 2 Report Procedure; 3 Review of Decision not to submit a Complaint to the Enforcement Committee or not to investigate a Report; 4 The Enforcement Committee; 5 Disciplinary Proceedings; 6 Procedure at the Appeals Committee; 7 Disciplinary Register; 8 Other Provisions.

1269 Soeharno, JIBLR 2021, 133; FBEE, Disciplinary Code art. 2.1.1.

1270 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.12-18.14; FBEE, Disciplinary Code art. 2.1.2-2.2.6 and 3.

(paid to the FBEE); or suspension of employment in (parts of) the banking sector for a period up to three years.[1271] The affected person has the right to appeal the decision before an appeals committee.[1272] Once an installed measure becomes irrevocable, it is entered into the disciplinary register (*Tuchtrechtelijk Register*), where the entry is kept for three years. This register can be accessed in pre-employment or in-employment screenings, only by banks whose employees have taken the banker's oath. It is worth noting that the Dutch financial market supervisory authorities DNB or AFM do not currently have access to the register.[1273]

However, to date cases have only been brought against client-facing employees, with relatively straightforward direct misbehaviour in the context of their client relationship. Bringing cases against higher-ranking employees is technically possible but might be more difficult, given the strong client-focus of the conduct rules.[1274] The explicit focus on client-facing employees means that de facto senior management (or the bank) will mostly not be addressed by a such disciplinary action. This has been part of the critique to this approach.[1275] 422

1271 Soeharno, JIBLR 2021, 133; Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.19; FBEE, Disciplinary Code art. 5.6.2.1.

1272 Soeharno, JIBLR 2021, 133.

1273 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.21; FBEE, Disciplinary Code art. 7.1-7.8. The authors criticise the fact that the financial market supervisors do not have access to the register and argue that the effectiveness of the disciplinary law would benefit from a such, see n 18.73.

1274 Laaper/Busch, Governance of Financial Institutions, Chap. 18 n 18.81; Zaring, Seattle U. Law Rev. 2020, 570. As of January 2024 only cases affecting client-facing employees were found, which was verified with the FBEE's publications on its website. Sanctions have been imposed for e.g. accessing client data without a business need, copying a client's signature, or office computer use for private means.

1275 Cf. Soeharno, JIBLR 2021, 133, as well as n 150 herein.

Part 5: Synthesis and Perspectives

This concluding part weaves together the insights and findings from the previous analyses. It commences by categorising the various perspectives of senior management and prudential corporate governance of banks from an international viewpoint to illustrate the evolving regulatory perception. Then, the corresponding Swiss approach is reflected within this broader international context. Assuming a holistic perspective, this part proceeds to a critical discussion of the current framework through a cohesive synthesis. Potential implications of the Swiss setup are elaborated and for these, subsequent avenues for possible future enhancements are suggested, also in consideration of the previously presented emerging approaches.

I. Senior Management and Prudential Corporate Governance: Different Perceptions at a Glance

A. International Bodies

1. Traditional Understanding

423 Prudential corporate governance of banks has emerged as specialised concept derived from general corporate governance. Assuming this specific perspective, it recognises the unique features of banks and addresses subsequent agency problems which arise from these. From an international perspective this specialisation was adopted in a separate prudential corporate governance framework by the Basel Committee on Banking Supervision (BCBS), "Guidelines Corporate Governance Principles for Banks", first published 1999 and since revised several times with its latest version dating from the year 2015. The role of senior management in prudential corporate governance has been increasingly emphasised in this framework. In the current version of these guidelines, the definition of corporate governance highlights the crucial role of senior management, as accordingly, it views corporate governance as a framework for determining the allocation of authority and responsibilities within a bank's governing bodies.[1276]

424 The BCBS guidelines have evolved to include detailed requirements concerning the composition, qualifications, responsibilities, and practices of senior management. The principles have always mandated that key personnel, particularly senior management, be fit and proper for their roles. While initially not further detailed, this prerequisite has been significantly elaborated over time, remaining a fundamental aspect of the guidelines. In their present version, they aim to ensure that senior management actively engages in good governance practices. This is achieved by clearly delineating the distinct roles of the board of directors and executive management, thereby strengthening the overall checks and balances within the bank. Respective principles cover sig-

[1276] See Part 1: I. B. 2 herein for the special features of banks, as well as Part 1: I. C for prudential corporate governance. Cf. also regarding general corporate governance Part 1: I. A. 1 and concerning its function Part 1: I. B. 1.

nificant aspects of the structure, organisation, expectations, and allocation of responsibilities. Especially focusing on the board of directors, the primary responsibility for corporate governance is assigned to this body. Aspects of executive management are also covered. Overall, in today's version, guidelines underline the integral role of senior management in the effective governance of banks.[1277]

This prudential perspective shows an intricate focus on the essential aspects of management, control, and the internal structure of banks. Senior management is thereby governed through the establishment of corporate governance frameworks, including subsequent fit and proper requirements. Regulating and supervising senior management of banks through these two elements can be considered the traditional regulatory approach. In this view, these individuals are an important piece in the organisational setup and affected by the requirements imposed by the BCBS guidelines. These individuals also as responsible for its implementation, clearly acknowledging the mutual influence between senior management and prudential corporate governance. 425

2. Evolution

The foundations for today's international corporate governance framework were largely established in the aftermath of the 2007-2009 global financial crisis, where considerable efforts were made to strengthen financial systems through technical regulations and more sophisticated corporate governance frameworks. However, in the post-global financial crisis era, these measures proved insufficient as persistent corporate misconduct and high-profile cases of financial scandals continued to surface in banks. These instances pointed to systemic issues and led to questions on the effectiveness of existing regulatory frameworks. More specifically, these incidents were found to highlight deep-seated problems in corporate governance, including principal-agent problems, misaligned incentives and distinct information asymmetries leading to specialised conflicts of interest, particularly regarding senior management roles. The substantial fines imposed on banks, rather than serving as deterrents (as intended), became mere operational costs, suggesting a failure in the effectiveness of these measures. The result was a significant negative impact on trust and confidence in the financial industry.[1278] 426

1277 See Part 1: I. C. 2.2 et seqq. for the development of the guidelines and today's framework.
1278 Cf. Part 1: II. A.

427 Given their scale and persistence, the instances were recognised as potentially becoming a systemic issue and posing a threat to stakeholders, shareholders as well as the broader economy. This situation highlighted the need for stronger and more effective corporate governance frameworks, particularly focusing on the role of senior management. It necessitated aligning individual actions with the long-term welfare of the bank and its stakeholders and fostering accountability and ethical conduct of these individuals. In light of the severity of these issues, discussions were prompted internationally. The Financial Stability Board (FSB), alongside other international bodies like the Basel Committee on Banking Supervision (BCBS) and Group of Thirty (G30), have made substantial strides in advocating for strengthened governance frameworks. The discourse started shortly after 2010 but gained particular momentum around 2015, when the issues intensified. In analysing these developments, two main themes were found to have emerged, namely the role and accountability of senior management in corporate governance, along with the impact of conduct and culture on these frameworks.[1279]

428 It has been observed that with the 2015 revision of guidelines, which remain in force until today, the BCBS markedly shifted its emphasis to also foster a corporate culture of ethical behaviour. This revision also brought senior management under closer scrutiny by supervisors, aligning with the broader regulatory focus on enhancing risk management and cultural governance within financial institutions. Responding to the small series of bank failures in spring 2023, the international body held that these were largely due to ineffective management and board oversight, coupled with the senior management's inability to respond adequately to supervisory instructions. It saw this situation to underscore the vital role of senior management in maintaining effective governance and risk management within banks and the need for significant improvements in these areas.[1280]

429 Furthermore, the Financial Stability Board (FSB) pointed out the central role of senior management in prudential corporate governance. The FSB's analysis and recommendations highlighted that effective governance requires not only robust systems and controls but also a strong ethical culture led by senior management. It observed the relationship between governance frameworks, culture and conduct, which were found to mutually influence each other both

1279 Cf. Part 1: II. B. 1 for a general discussion of the regulatory reception of persisting issues, as well as Part 1: II. B. 2 for the developments of international bodies.

1280 Cf. Part 1: II. B. 2.2 for a detailed discussion of the BCBS's developments, see also Part 1: I. C. 2.2 for the evolution of the guidelines.

positively and negatively. The FSB sees individual accountability as a core concept in ensuring that senior executives are responsible for corporate governance frameworks and also for ethical conduct within their organisations. Overall, the FSB's work illustrates the critical need for senior leaders in financial institutions to take responsibility for their actions and actively foster a culture of ethical behaviour and responsibility, aspects which it sees as cornerstones of effective governance.[1281]

In addition, the Group of Thirty (G30) has been emphasising the crucial role of senior management in prudential corporate governance of financial institutions. It highlighted the need for a combination of solid organisational structures and the right people, skills, and values. Focusing on the importance of conduct and culture, the G30 identified these aspects as key contributors to governance failures. Senior management were urged to enhance accountability, reassess governance structures, and foster a culture aligned with high ethical standards. Thereby, the G30 advocated for blending hardware aspects of governance, like organisational structures and processes, with software elements like culture and behaviour, to achieve a comprehensive and sustained reform in banking conduct and culture. The G30's recommendations underlined the pivotal role of senior management in leading and sustaining effective corporate governance within banks.[1282] 430

These international developments in the senior management's role in prudential corporate governance frameworks have marked a significant departure from traditional approaches in this field. They reveal a paradigm shift to a more holistic view of governance. In this reformed understanding, the quality and conduct of senior management in banks are increasingly recognised as central to the institutions' health and stability, as well as to the broader financial system. This enhances the previously dominant traditional approach, where these individuals were mostly seen as being a piece of the organisational puzzle in technocratic corporate governance understanding. The developments emphasise that effective governance transcends structures and processes, spotlighting the critical role of the individuals at the helm. By focusing on the behaviour and accountability of senior managers, these bodies acknowledged that leadership plays a crucial role in shaping the culture and ethical standards of a bank. 431

1281 Cf. Part 1: II. B. 2.1 for a detailed discussion of the FSB's developments.
1282 Cf. Part 1: II. B. 2.3 for a detailed discussion of the G30's developments.

432 It is interesting that this shifting view was initiated even though no effective crisis occurred, which usually constitutes a catalyst for renewed perspectives. In addition, there was no overhaul of the framework or establishment of new regulatory standards, but rather, besides some changes in the BCBS principles, the focus is on sharing best practices and fostering international discourse on the topics. Overall, the research underscores the ongoing need for adaptive and responsive governance frameworks led by competent individuals, beyond operational efficiency. Thereby, the evolving challenges of the complex nature of the banking sector should be ably navigated to ensure stability, trust, and integrity in the financial system..

B. Emerging Models

433 Not only did international bodies adopt a reformed perception on senior management and corporate governance of banks in response to the identified issues, national jurisdictions followed suit as well. The herein two identified model jurisdictions, the United Kingdom and the Netherlands, built their reforms on the same premise: inefficient corporate governance revealed through persisting misconduct. They were identified as thought leaders as both enhanced their existing systems with additional *emerging approaches* and as the elaboration of the key features and the more detailed aspects along the supervisory law life cycle revealed, both jurisdictions have an array of novel methodologies.[1283]

434 In the *United Kingdom*, the global financial crisis and subsequent conduct failures were found to highlight significant deficiencies in corporate governance, which prompted a shifting view on the role of senior management in these frameworks. Despite having governance structures that appeared robust on paper, many banks faced severe issues due to poor governance and control, leading to widespread misconduct. The traditional collective responsibility of senior management often meant that no single individual was held responsible, allowing these individuals to evade personal accountability for the bank's failures. Recognising these issues, reforms were proposed in 2013 to restore trust in the banking sector by making individual accountability a reality and overhauling bank governance. In response, the Senior Managers and Certifica-

[1283] Cf. Part 1: II. B. 3.1 for a conceptual definition of the emerging approaches; see furthermore Part 1: II. B. 3.2.3 for the reception of the British and Part 1: II. B. 3.3.4 for the reception of the Dutch approach.

tion Regime (SM&CR) was introduced in 2016. It was built into the pre-existing setup on senior management regulation and supervision consisting of a corporate governance framework and fit and proper requirements.[1284]

Under the SM&CR, senior management individuals are subject to an entry barrier to ensure the safety, soundness, and good conduct of financial institutions. Individual senior management undergo a rigorous fit and proper assessment by banks, extensively guided by regulatory authorities, which includes evaluating their qualifications, competence, and personal attributes. Furthermore, senior managers are also subject to specific conduct rules. A distinctive feature of the SM&CR is the clear attribution of responsibilities to each senior manager, outlined in detailed documentation. This documentation specifies their duties and areas of accountability and requires information on how these responsibilities intersect across the bank's governance structure.[1285] In a potential enforcement procedure, regulatory authorities are then allowed to identify the responsible senior manager using the submitted documentation. Consequently, they might impose a subsequent instrument for misconduct in their area of responsibility, which includes financial penalties, suspensions, or even criminal charges for serious failures like reckless banking, further underscoring their critical role in ensuring prudential corporate governance.[1286] 435

Thereby, this regime aims to improve corporate governance in financial institutions by directly regulating individuals in senior roles. This approach reflects the UK's commitment to promoting prudent management and ethical behaviour in banking, setting a high standard for leadership in financial institutions. It is fundamentally built on the principle of individual accountability and responsibility, aiming to rectify the failures in corporate governance that were brought to light during the global financial crisis and onwards. The illustration of the analysis of the UK approach along the supervisory law life cycle showed its focus lies on the on authorisation and enforcement phases. 436

In the *Netherlands*, the Dutch National Bank (DNB) has recognised the issues emerging through the global financial crisis and the ensuing scandals were not merely due to structural governance failures but also deeply rooted in subpar board and management behaviours, including a lack of effective leadership and 437

1284 See Part 1: II. B. 3.2.2.1 for the British rationale of the emerging approach, as well as Part 1: II. B. 3.2.1 for the general setup of its regulatory architecture including senior management and corporate governance foundations and Part 1: II. B. 3.2.2.2 for an overview on the key features of this model.

1285 See Part 2: III. A for details.

1286 See Part 4: III. A for details.

adverse incentives. Consequently, the Netherlands embarked on enhancing the traditional measures of bank corporate governance and fit and proper assessments with a supervisory methodology. This was built with a significant emphasis on the behaviour and culture of financial institutions and their senior management. The Dutch approach does not present a closed conclusive model (like the UK), rather there are several aspects in its supervisory approach which underscore the focus it sets forward regarding the behaviour and culture of senior management and banks.[1287]

438 Accordingly, the Dutch perspective on senior management regulation and supervision is marked by its emphasis on ethical standards and proactive oversight. Under its behaviour and culture supervision the DNB's risk assessments are conducted as a means of ongoing monitoring. These centre around institutional behaviour and culture, primarily targeting senior management. While showing a distinct focus on culture, the Dutch approach does not prescribe what a culture should look like. Rather, the DNB views the banks' governing bodies, and especially executive management, as primarily responsible for improving the banks' behaviour. The authority employs an array of prudential and psychological tools to foster healthy cultures and address behavioural and cultural risks.[1288] While the Dutch approach has a pre-dominantly forward-looking focus, traditional enforcement mechanisms remain at the DNB's disposal to use against both individuals or institutions when necessary.[1289]

439 Another unique aspect of the Dutch approach is the requirement to swear an oath, which focuses on faithfully and diligently executing client interests. While initially this was confined to bank governing bodies it has since been expanded to all financial sector employees. This oath, which for senior management constitutes an integral part of their fitness and propriety assessment, is accompanied by conduct rules further reinforcing client-centred practices.[1290] The Netherlands has also installed a (semi) private disciplinary board in the banking sector, enforcing adherence to the banker's oath and conduct rules. This aspect further underscores the Netherlands' commitment to high ethical standards in the financial sector, exemplifying a comprehensive, conduct-centred approach to regulating senior management.[1291]

1287 See Part 1: II. B. 3.3.2.1 for the Dutch rationale of the emerging approach, as well as Part 1: II. B. 3.3.1 for the general setup of its regulatory architecture including senior management and corporate governance foundations and Part 1: II. B. 3.3.2.2 et seq. for its key features.

1288 See Part 3: III. B for details.

1289 See Part 4: III. B for details.

1290 See Part 2: III. B for details.

1291 See Part 4: III. B for details.

The Dutch perspective on senior management and prudential corporate governance is thus marked by a commitment to upholding rigorous traditional regulatory standards, while simultaneously pioneering in the area of behavioural and cultural supervision to enhance effectiveness of the former. This comprehensive approach reflects a nuanced understanding of effective governance in the financial sector, where a healthy organisational culture is seen as pivotal in shaping the conduct and effectiveness of senior management in banks, while also rendering it responsible for such. The analysis revealed the focus of the Dutch approach to be on ongoing supervision. 440

Overall, both emerging approaches embarked on a more holistic understanding of senior management in prudential corporate governance frameworks. Besides the already established corporate governance frameworks and fit and proper requirements as traditional regulatory approach, they recognised the crucial role of senior management within these frameworks. This recognition has led to an evolution beyond traditionalist and technocratic views, explicitly acknowledging the vital role these key individuals play in the effective and successful implementation of governance frameworks to fully realise its potential in serving supervisory objectives. Both differently adapted this importance into their systems and added further methodologies to capture the perceived importance. The UK focuses on expanding its traditional financial regulatory toolkit, while the Netherlands emphasises the impact of senior management on the culture and behaviour of a bank, employing novel regulatory methodologies and instruments. 441

C. Switzerland

1. Perception

With this understanding of the previously reviewed international developments, the perspective now shifts to Switzerland. The preceding analyses have showed that there is no dedicated bank senior management regulation or supervision in Switzerland. Rather, a such is intricately woven into the broader fabric of institutional regulation. Consequently, organisational and personnel requirements of the bank impact senior management and reveal a dual-perspective strategy in regulating and supervising these individuals.[1292] The current setup was found to be a product of historical development. Senior man- 442

[1292] See Part 2: I. A. 1 et seqq. for an overview on the framework.

agement has been a focal point already observable in the first draft of today's Banking Act and also in some of its subsequent reforms, however, there has traditionally been significant opposition in imposing regulatory requirements towards such individuals. This only allowed for a gradual introduction of relevant provisions. In the first version of the Banking Act, organisational requirements were installed in 1935 (today in BankA 3 II a), to allocate and delineate powers of and prevent abuse and arbitrary actions in the senior management of banks. As a next step, with its first revision in the 1970s, a licensing obligation was implemented into the Banking Act, which not only included the pre-existing organisational but also personnel requirements. It was also then that the irreproachability guarantee was established as a licensing requirement (today in BankA 3 II c). Thereby, it was recognised that senior management individuals hold positions with potential implications for both individual clients and the broader financial system. Consequently, the legislator saw a necessity in ensuring that the bank is led by individuals who show a reliable character and are professionally competent.[1293]

443 Today, under the Swiss Banking Act and accompanying Banking Ordinance, a structured *organisational framework* is mandated for banks and their governing bodies (cf. BankA 3 II a in conjunction with BankO 11). These organisational stipulations form the cornerstone of corporate governance, thereby exerting an indirect regulatory influence on senior management by imposing certain structures. Most importantly, a functional and personnel separation is prescribed which is realised through the separate instalment of a board of directors and an executive board, aimed at diffusing risks associated with a centralised authority. Moreover, provisions of the FINMA-Circ. 17/1 "Corporate Governance – Banks", which is *inter alia* based on BankA 3 II a, elaborates this organisational structure. It also provides a catalogue of roles and responsibilities for senior management, predominantly directed at the supervisory board. Within these responsibilities, aspects of corporate governance are assigned to both governing bodies, however not the responsibility for corporate governance as a whole.[1294]

444 In addition, by setting forth *personnel requirements* for the banking license, the irreproachability guarantee in BankA 3 II c constitutes the second element of the dual-perspective strategy to regulate senior management in banks. Thereby, the persona of the senior manager is addressed, and it is required that "*persons entrusted with the administration and management of a bank*"

1293 See Part 2: I. A. 2.1 for a historical evolution of the relevant norms in the Banking Act.

1294 See Part 2: I. A. 1.2 for an overview on these requirements as well as Part 2: I. B. 3.1 for their detailed discussion.

must "*enjoy a good reputation and provide a guarantee of irreproachable business conduct*" (cf. BankA 3 II c). This encompasses both the members of the supervisory board and those of the executive body, but it is not necessarily limited to them. It constitutes the Swiss equivalent to the requirements which are otherwise mostly referred to as fit and proper. Consequently, BankA 3 II c encompasses both a professional (also: fitness) and moral component (also: propriety), imposing subsequent requirements on senior management. Furthermore, the Banking Act sets forward that the persons entrusted with the management of the bank have their place of residence where the exercise of the management can actually and responsibly be exercised (BankA 3 II d).[1295]

Thereby, with the current setup the Swiss perception of senior management and prudential corporate governance can be considered a traditional one: the corporate governance framework installs a basic setup on the senior management and the irreproachability guarantee sets forth prerequisites regarding the fitness and propriety of such individuals. Both requirements are placed upon the bank as an institution. While at first the senior management regulation and supervision might not be apparent, the distillation along the analysis along the supervisory law life cycle revealed that in all of the phases, senior management played a role. 445

2. Reception of Developments

The current Swiss framework, remaining loyal to the traditional understanding of regulating and supervising senior management, has not recently evolved significantly from a substantive legal perspective. The formulation of organisational requirements in BankA 3 II a has virtually remained unchanged since its introduction in 1935. The same holds true for the requirement of the irreproachability guarantee (cf. BankA 3 II c), which has stayed unaltered since its establishment in 1975.[1296] Despite Swiss financial market law generally adhering to a principle-based approach, this persistence is still noteworthy given the substantial transformations within the banking industry over the past decades. What has been subject to reform recently is FINMA-Circ. 17/1, which came into force after a thorough revision in 2017. One of the reform's goals was to align the Circular with the adapted international framework.[1297] 446

1295 See Part 2: I. A. 1.3 for an overview on these requirements as well as Part 2: I. B. 3.1 et seq. for their detailed discussion.

1296 Cf. Part 2: I. A. 2.1.3.2, Part 2: I. A. 2.1.3.3. a.

1297 See Part 2: I. A. 2.2 for the development of the Circular.

447 The limited evolution of the relevant legal foundations in recent years does not generally preclude that Switzerland has engaged with the two core themes, dominating the international discourse and regulatory shift, namely senior management accountability and conduct and culture evolving as topics of financial market supervision. The topic of senior management accountability was explicitly addressed in 2021, with political demands to empower FINMA with an expanded toolkit to ensure accountability at the highest management levels in financial institutions. Subsequently, the Federal Council commissioned a report to analyse the effectiveness of existing instruments and to evaluate whether a stronger individual assumption of responsibility could be achieved, either at FINMA's level or through new legislative rules.[1298] In addition, a limited academic debate was identified regarding the UK's SM&CR, including its potential (partial) implementation in Switzerland.[1299] This topic, along with the broader discussion on the role of senior management in general, gained new momentum with the emergency takeover of Credit Suisse by UBS in March 2023. The SM&CR was then explicitly suggested as a possible means to reduce the hurdle of individual attribution in imposing a professional ban by the expert group on banking stability. It was thereby seen as an instrument to enhance the supervisory capabilities of FINMA towards systemically important banks.[1300]

448 With regard to FINMA, it was found that its view shifted from acknowledging the British developments in 2015 but preferring the Swiss approach, to working on a proposal for a Senior Managers Regime to the legislator, particularly aimed at addressing individual responsibility in enforcement proceedings, as revealed in early 2023.[1301] In addition, FINMA for the first time (as far as publicly known) required the bank Credit Suisse to document the responsibility of its top managers (around 600 individuals) following the "Greensill" case in February 2023, a measure which appears to have been based on the UK's approach.[1302]

449 Culture and conduct, the second set of broad core themes recognised in international developments, were not found to be widely acknowledged as potential topics for financial market supervision. In Switzerland, the term "cul-

1298 This refers to the Postulate 21.3893 from Andrey Gerhard in the National Council from 18.6.2021, cf. n 116 and fn 980 of this thesis.

1299 See e.g. Reiser, SZW 2022, 550-555, Emmenegger, AJP 2022, 817-830.

1300 Cf. Expertengruppe Bankenstabilität, Report 2023, 58, 65, 81, 85. See also n 116 of this thesis; for a general discussion of the report see fn 376 and n 6.

1301 See n 116 herein.

1302 Cf. n 140 for a discussion of the case.

ture" is mentioned only once in the FINMA-Circ. 17/1.[1303] This is opposed to the BCBS guidelines, which emphasise the importance of this aspect and refer to the term 38 times in the present version from 2015.[1304] While the herein relevant irreproachability guarantee's element of "propriety" undeniably pertains to a person's conduct, its discussions assuming a perspective of moral guideline often face significant criticism. This general opposition also led to the omission of this element's further elaboration in FINMA-Circ. 17/1.[1305] In addition, the Federal Council, by asserting that cultural errors in banks cannot be eradicated through regulation following the emergency takeover of Credit Suisse by UBS, seemingly displayed a generally dismissive stance on incorporating such topics into financial market supervision.[1306] Still, the preceding analyses have revealed that the supervisory authority seems to increasingly acknowledge culture and senior management conduct as a factor in cases of corporate governance failures in its practice, as the topic was found to be a theme in some of the analysed cases.[1307]

From this it is argued that the broad international discourse regarding enhancing corporate governance frameworks especially by focusing on senior management accountability, as well as conduct and culture, which has been emerging after the global financial crisis of 2007-2009 and intensifying since around 2015, has not taken place in Switzerland to the same extent. The discussion in Switzerland has been predominantly driven by ongoing scandals, especially concerning the bank Credit Suisse, and seemingly gained momentum primarily after its emergency takeover in March 2023. The limited reception of the international developments in Swiss financial market regulation and supervision does not *per se* imply that the Swiss system is lacking quality or effectiveness. Rather, it might speak for the chosen principle-based approach. This also constitutes Switzerland's main stance, according to which the approach provides sufficient flexibility to address evolving issues in a highly dynamic sector. In the herein analysis, as far as observable a certain flexibility was found to be evident in the context of FINMA's enforcement practice, where a slight shift towards international developments was identified. 450

1303 Cf. FINMA-Circ. 17/1, n 10 which states that "*The board of directors sets out the business strategy and defines guiding principles for the institution's corporate culture*". See also n 162 herein.

1304 See n 93 herein.

1305 See Part 2: I. A. 2.2.1 et seq.

1306 See Häberli/Schäfer, Keller-Sutter Interview NZZ 25.3.2023, also referenced in n 136 of the present work.

1307 Cf. e.g. n 380, 384

3. Need for an Evolution?

451 Still, the principle-based approach and the identified flexibility in practice (at least to some extent), do not preclude the possibility that certain amendments could be considered to enhance the traditional regulatory approach of Switzerland towards senior management regulation and supervision. Not least it was revealed that many large-scale corporate governance failures emerged in Swiss banks over the recent years, which also illustrated the inability or unwillingness of senior management to adequately respond to the underlying issues.[1308] Furthermore, Switzerland set a discreditable precedent as the first jurisdiction where a globally systemically important bank was on the verge of its resolution, only to be saved by an emergency takeover. On paper, the affected institution, Credit Suisse, met the regulatory capital and liquidity requirements and was deemed stable from this perspective. An initial finding from the first report of the expert group on banking stability observed that the crisis at the bank stemmed from numerous scandals, resulting in a loss of trust from clients towards the bank's management and its conduct. While the report assumed that a stronger equity buffer likely would have afforded the bank more time to implement its strategic restructuring, it found that management initiated this restructuring too late.[1309] Of course, this significant event calls for a comprehensive review of the entire regulatory framework for banks, including capital and liquidity requirements. Yet, from the author's perspective a such analysis must also include the regulation and supervision of senior management and the corporate governance of banks.

452 Moreover, it was shown that the supervisory authority openly voiced the limits of its competence with regards to these individuals in general.[1310] In addition, the potential need for adjustments has also been raised in the political discourse.[1311] Most importantly, over the course of the preceding analyses it was pointed to several aspects of the current framework which could warrant reconsideration. Consequently, these reasons prompt an inquiry into the concrete implications and potential subsequent adjustments which might be necessary to ensure the overall effectiveness of the Swiss framework of regulating and supervising senior management.

1308 Cf. Part 4: I. B.
1309 Expertengruppe Bankenstabilität, Report 2023, 10, 14 et seq.
1310 See n 349 et seq.
1311 See n 116 and fn 980 of this thesis.

II. Discussion of the Swiss Framework

A. Present Setup and Future Perspectives

1. General Discussion

Turning to a discussion of senior management regulation and supervision in large Swiss banks, this chapter commences by a general systemic critique of the previously analysed framework to foster a general understanding of the overarching challenges, before diving into detailed implications in the ensuing sections. 453

Given their inclusion in the bank's licensing prerequisites, until today the requirements for these individuals have to be distilled and pieced together from the institutional requirements. The dual-perspective strategy, where senior management is regulated and supervised through both organisational and personnel requirements of the bank license, generally installs a certain level of complexity.[1312] This indirect approach to regulating and supervising senior management individuals through institutional means, in which it is at first not immediately apparent but nevertheless plays a role, accentuates throughout the supervisory law life cycle. It is exemplified in the authorisation phase. While technically not subsequent to an official personal licensing or certification in order to hold a senior management position in a Swiss bank, such professional activities of these individuals are still governed by an official authorisation process which is subjected at the bank as an institution.[1313] Furthermore, in the enforcement phase, it was shown that measures were often imposed on the institution but still had significant consequences for senior management.[1314] Given this approach of primary institutional regulation, which results in a *de facto* secondary individual regulation, the exact nature of the latter is naturally hard to discern. Through the in-depth analysis it became evident that the Swiss setup constitutes a complex convergence which renders senior management regulation and supervision generally opaque. 454

1312 Cf. Part 2: I. A. 1 for an overview of the framework.

1313 Cf. Part 2: I. B. 4 for the analysis of the authorisation process.

1314 This was especially the case under FINMASA 31, see Part 4: I. B. 2.1.3 et seq. but also FINMASA 32, see Part 4: I. B. 2.2.3 et seq.

455 The present setup, with its embedment in the institutional supervision and the dual-perspective strategy, leads to instances where theoretically regulation and supervision of senior management was identifiable, but the in-depth analysis revealed that in reality these individuals sometimes slip through these regulatory mechanisms. This is particularly evident in ongoing supervision. In this phase, corporate governance, and thereby the organisational perspective to regulate senior management, is acknowledged as a crucial part of the annual regulatory audit. However, the detailed analysis uncovered significant gaps in the framework's effective supervision, especially with regards to senior management.[1315] Furthermore, the irreproachability guarantee, and thereby the main aspect of the personnel requirements, was not found to be subject to an institutionalised means of ongoing supervision.[1316] In addition, in the enforcement phase, where instruments exist which target individuals in a management capacity, these often cannot be imposed due to hurdles in practical application. Thereby, the current setup often creates a regulatory semblance, where senior management appears to be regulated and supervised through the institutional requirements, but the analysis of their practical application reveals potential shortcomings and even indicate complete inefficiencies in certain aspects.

456 The previous analyses also revealed that senior management is more influenced by the corporate governance framework than it is considered responsible for it. This was found to permeate through the supervisory law life cycle: in the authorisation phase, corporate governance installs a certain structure on governing bodies and it prescribes their broad responsibilities, but it refrains from specifying them, as well as from allocating an overall responsibility for the framework to the governing bodies.[1317] In the ongoing supervision, corporate governance constitutes an important topic, but its monitoring fails to take into account its link with senior management.[1318] Finally, in the enforcement phase senior management does generally not seem to be held directly responsible for violations of corporate governance.[1319] This indicates an asymmetric interdisciplinarity between the corporate governance framework and senior management, which creates a kind of vacuum: senior management is

1315 Cf. Part 3: I. B. 1.

1316 Cf. Part 3: I. B. 2.

1317 For the allocation of responsibilities in general see n 188 et seqq., see also n 221 where this point was illustrated.

1318 For the monitoring of corporate governance in general see n 260, regarding the missing link to senior management see n 268, 296 et seq.

1319 See especially n 322, 409, 413 more generally also the whole analysis of the instruments in Part 4: I. B.

more significantly influenced by corporate governance than it is effectively considered responsible for it. This potentially leaves a gap where the main actors of the corporate governance framework cannot be held responsible for their failure to implement and maintain an effective framework.

457 Overall, the analysis of the current setup revealed no conclusive systematic approach to regulating and supervising senior management in large Swiss banks, rather the patches of a such must be assembled trough their derivation from the institutional requirements along the supervisory law life cycle. Collectively, these segments do not constitute a coherent system but rather represent a fragmented approach, indicating a patchwork. Along these patches, senior management is regulated and supervised through a complex convergence of institutional regulatory mechanisms, rendering it generally hard to discern. In addition, the very setup potentially creates deceptive appearance of regulatory mechanisms towards senior management which however in reality are not comprehensively so. Also, these segments fail to fully recognise mutual influence between senior management and corporate governance frameworks, especially creating a vacuum around accountability for failures of the latter. The patchwork nature, being merely a collection of disjointed pieces and not a cohesive system, renders the supervision and regulation of senior management both ambiguous and elusive and consequently implies the presence of deficiencies and potential inefficiencies. Thereby, it is questionable whether the present framework adequately reflects the importance of senior management.

458 The current regulatory approach to senior management raises several issues from the author's viewpoint, as it may compromise the efficiency of regulation and, given the reciprocal relationship of these individuals with corporate governance, could also undermine the effectiveness of organisational requirements. This situation affects two out of three key licensing prerequisites for banks, raising concerns about whether the existing framework adequately supports the supervisory goals of depositor protection and overall systemic stability. Yet, it is worth considering the historical reluctance to regulating these individuals, and accordingly, the current situation also invites a general reflection into the degree to which the framework genuinely aims to regulate and supervise these individuals in an effective and coherent manner. Still, the analysis evidenced the necessity for a robust regulatory approach towards these individuals, which prompts a detailed reassessment of the present framework.

459 With these preliminary evaluations in mind, in the following section the concrete implications of senior management regulation and supervision will be explored and potential future perspectives presented. Building upon the foundational knowledge of the preceding analyses, these discussions will assume a holistic perspective by considering their overarching impact on the entire cycle. The suggestions for future enhancements will be integrated into the existing general setup rather than suggesting an overhaul of the framework. In addition, they consider the general opposition on senior management regulation and the underdeveloped discussion regarding conduct and culture as a means of financial market supervision, thereby seeking to present feasible approaches for the future.

2. Detailed Discussion

2.1. Increase Quality and Quantity of Communication

2.1.1. *Identified Implications*

460 A recurring theme in the preceding analyses on the regulation and supervision of senior management of banks was the notable deficiency in communication and transparency from the supervisory authority. It was found that FINMA has already expressed an interest in more transparent and active communication about its supervisory activities, particularly regarding completed enforcement actions and the issue was also raised by the expert group on banking stability. In addition, in its strategic goals FINMA communicated its commitment to ensure maximum possible transparency and it sees this as an important factor to foster confidence in the supervision of the financial sector.[1320]

461 It is understood that FINMA's communication activities are in a constant state of tension. On one hand, there is the need of affected entities and individuals for information, alongside the broader public. On the other, the authority might not want to disclose too much information given that this may cause it to lose a strategic advantage. In addition, it must adhere to the principle of official secrecy (cf. FINMASA 14) and certainly protect the personal rights of the affected (cf. also FINMASA 22 IV), aspects which especially concern publications regarding enforcement cases. Furthermore, more open communication might make the authority itself vulnerable to critique as its practices are con-

[1320] See n 321, as well as Part 4: I. A. 4 for a general discussion FINMA's communication.

sequently subject to greater scrutiny. However, as will be argued in the following section, the author considers the current setup and practice problematic for three main reasons.

Firstly, it negatively impacts the standing of senior management but also more broadly financial market participants. These are hampered or sometimes even completely restricted from accessing supervisory practices. With regards to senior management, it was shown along the different phases of the supervisory law life cycle that it is not clearly communicated what supervisory expectations are put towards them and what their role is expected to be in the respective phase. During the initial phase of *authorisation*, it became apparent that there is a lack of detailed explanation regarding how the authorisation process for individuals is conducted, despite their significant presence in licensing requirements. The guidance from FINMA is largely confined to specifying the required documents for the licensing process. Beyond these, there is scant material available on the intricacies of such procedures, including aspects like the roles of individuals in the process (as opposed to the institutions), potential interviews with candidates, and the duration of the initial assessment.[1321] In *ongoing supervision*, there was a lack of transparent communication identified about deployed instruments regarding the monitoring of senior management. Although there were indications of meetings between the authority and senior management found in the literature, these interactions are neither documented nor publicly communicated by the supervisory authority, precluding their analysis as subsequent instruments for the present context.[1322] Consequently, it is not transparently communicated to these individuals what role they assume in the subsequent phases under the umbrella of institutional regulation. 462

The peak of this lack of communication and transparency became evident in the analysis of the *enforcement* phase. Generally, the supervisory authority is not permitted to comment on specific cases according to FINMASA 22 II, with possible exceptions to meet supervisory needs, correct misinformation, and protect the reputation of the Swiss financial market. Moreover, the analysis indicated a decreasing quality and quantity of information on enforcement proceedings over time. Today the communications mostly encompass broad case descriptions which lack the nuanced considerations necessary to understand the imposition or non-imposition of certain measures.[1323] Together with the 463

1321 See n 219 et seqq., 228.

1322 See e.g. n 250, 298, 300 where this issue is highlighted.

1323 See n 318 et seqq., 404.

increasingly principle-based nature of FINMA's regulation (cf. FINMASA 7 II), which is also clearly evident in the development of FINMA-Circ. 17/1, it leaves financial market participants, and especially senior management, with few reference points from which to derive standards for their own conduct. Furthermore, the inconsistent use of terminology and the occasional omission of referencing relevant norms adds a level of confusion to the scant communications.[1324] Lastly, with the present practice a potential learning effect for supervised entities and individuals, which could result from accessing and assessing past wrongdoings of their counterparts in the market, is lost.

464 Secondly, from an academic perspective, it is generally challenging to conclusively grasp and scrutinise the current practice of FINMA due to significant opacity on part of the supervisory authority. This implication is not unique to the context of this thesis but applies to academic discourse in general. It renders a well-founded analysis of supervisory practices difficult and prone to errors due to the considerable degree of interpretive leeway it offers. Given that ultimately only FINMA conclusively has access to information which would be required to seed a discussion or enable an analysis, there is essentially no basis for other parties to discuss its practice.[1325] Thereby, the current practice generally stifles academic discourse. This restraint results in a missed opportunity to make a significant contribution to the critical discourse, which could also provide inputs for further development of financial market supervisory instruments.

465 Thirdly, the current setup also raises implications from the perspective of the broader public and from a socio-political nature. Presently, the broader public is possibly not rightly informed about the actual unstable state of bank, as FINMA is not allowed to inform accordingly.[1326] Moreover, the current practice can lead to false impressions regarding the important work of the supervisory authority. It might appear that FINMA is not doing enough, or it could appear that the supervisory authority operates behind closed doors, hidden from public scrutiny and external accountability. It also shields the public from being knowledgeable about potential restraints FINMA might face in exercising its powers in its subsequent legal framework, insights which would be valuable

1324 See n 394.

1325 Also FINMA is excluded from the FoIA, see FoIA 2 II and n 391 herein. It is worth noting that while publicly available court decisions (of appeals against enforcement actions) provide more detail than FINMA case summaries, still they often lack the supervisory authority's full rationale which would be key to analyse its practice.

1326 Cf. Expertengruppe Bankenstabilität, Report 2023, 58; see also n 321 herein.

to foster subsequent parliamentary discussions. Overall, these implications give rise to reconsider FINMA's communication activities in order to increase its quantity and quality.

2.1.2. *Perspectives*

While the topic of communication was not explicitly addressed during the analysis of emerging approaches, it has become clear that the DNB shows a different emphasis on its communication activities. As its behaviour and culture supervision is only sparsely codified in material law, this approach necessitates comprehensive and consistent communication from the authority.[1327] For instance, DNB regularly disseminates findings from its behaviour and culture assessments and publishes anonymised case examples from its supervisory activities. Regarding enforcement procedures, there is the general principle of complete public disclosure of financial market supervisors on the imposition of their administrative sanctions, including measures imposed on individuals. This disclosure serves multiple purposes, including offering insights into the enforcement practices of regulatory authorities, informing and cautioning market participants, and contributing to both general and specific prevention. Exceptions are only permissible when explicitly justified by supervisory law.[1328] Overall, a strong impression of transparency in the DNB's operations was conveyed through the analysis, which clarifies expectations towards financial market participants, learning effects for the sector and enables a critical academic discourse and transparency towards the greater public.[1329] 466

For considerations on a more transparent approach towards communication in financial market supervision in Switzerland, it must be distinguished between the authorisation and ongoing supervision phases on one side and the enforcement on the other. Regarding the former, there is no identified restraint, apart from the personal rights of the supervised entities and individuals, which would prevent the supervisory authority from more proactive communication. Currently, FINMASA 22 I sets forward a minimal requirement, according to which FINMA must communicate at least once a year on its supervisory practice and activity. From the author's point of view this does not 467

1327 Pro memoria: In the Netherlands, this type of supervision is simply derived from the continuous adherence to the corporate governance requirement and thereby FSA 3:17. In contrast to a set of predetermined regulations, the behaviour and culture supervision in the Netherlands adopts a distinctive approach, anchored in a model developed by the DNB, see herein Part 1: II. B. 3.3.2.2.

1328 See Part 4: III. B where this is discussed.

1329 Cf. Part 1: II. B. 3.3.2.2, Part 2: III. B, Part 3: III. B, Part 4: III. B.

restrict the authority from communicating more extensively. Increased communication and transparency could be achieved through, for example, offering more guidance on the role of senior management in the licensing process and ongoing supervision. As a recent example in the present context, the supervisory authority has published guidance on changes in senior management.[1330] In addition, proactive ongoing communication on aspects of these two phases could be considered, where, for example, recurring topics identified in these phases are addressed or best practices are shared. The latter would necessitate amendments to FINMA's communication policy.[1331] More generally, this policy could be amended to reflect a more open communication manner and more closely align it with the authority's strategic goals. If it is preferred to anchor a subsequent principle in material law, FINMASA 22 I could be modified to mandate the authority to communicate more concretely and actively.

468 With regard to a change in communication about *enforcement* procedures, the question arises whether an anonymised communication practice would be possible under the current FINMASA 22 II, which states that FINMA generally does not provide information on individual proceedings. Given the current wording, which clearly establishes a principle of non-communication and the very restrictive interpretation of the norm, it would likely need to be revised.[1332] As opposed to its present form, the norm could be amended to establish a general principle of communication regarding enforcement proceedings, whereas non-disclosure would constitute the exception.[1333] Amending the legal bases in FINMASA would also necessitate a revision of FINMA's communication policy. Establishing a generally anonymised communication practice (not only in enforcement) could mitigate the potential conflicts with infringe-

1330 Cf. FINMA, Wegleitung Organmutationen, see also herein Part 3: I. B. 2.3.

1331 E.g. regarding the licensing it is only held that the authority publishes names and licensing status of supervised institutions, along with a negative list of firms which might engage in business activities without holding the required license. Regarding ongoing supervision, it includes the general rule that FINMA does not provide information on ongoing supervisory activities, mostly for reasons of confidentiality and market sensitivity, see FINMA, Communication Policy, 8 et seq.

1332 See also Abegglen/Schaub, 576 who consider a change of practice as possible under the current legal framework, given that the confidentiality interests of the parties must also be taken into account with the present setup. Hence, they see them as sufficiently safeguarded by limiting publications to legally important considerations and adhering to an anonymity principle.

1333 See also Bertschinger, SZW 2023, 728 who alternatively suggests a change in the wording of FINMASA 22 II, according to which information on individual proceedings may be published if there is a supervisory need instead of a particular supervisory need as foreseen as of today.

ments of the personal rights of affected individuals. In general, an expansion in the authority's communication would require the allocation of appropriate resources to successfully fulfil its tasks.

Enhancing transparency of communication could overall positively impact the efficacy of financial market regulation by establishing clarity towards supervised entities and their senior management, leading to learning effects for the financial sector, providing a discussion basis for academia and making the public aware of potential restraints in financial market supervision. 469

2.2. Requirements and Authorisation

2.2.1. *Refine the Irreproachability Guarantee*

2.2.1.1. Identified Implications

The Swiss irreproachability guarantee has been a pivotal yet contentious bank licensing requirement since its establishment in the 1970s and can be considered the Swiss equivalent to the concept otherwise most commonly known as fit and proper.[1334] A critical examination of this requirement uncovers several aspects which, from the author's perspective, potentially compromise its effectiveness: its inherent indeterminacy; the predominantly negative interpretation; and the imbalanced importance of its two elements. These factors will be explored in the following. 470

The irreproachability guarantee, as the key personnel requirement, is *inherently indeterminate* and the least detailed of all authorisation requirements. It is supplemented only by specific documentation requirements in the Banking Ordinance (cf. BankO 8 I a), with further clarifications limited to general clauses about professional requirements regarding senior management in FINMA-Circ. 17/1. Rather than being defined through written rules or guidelines, this indeterminate legal concept seemingly should be contoured through FINMA's application in practice, primarily through the assessment of subsequent violations.[1335] Theoretically, individual behavioural guidelines could be derived from inferences made in the context of infringements with the irreproachability guarantee. However, due to FINMA's restrictive communication, especially in enforcement, deriving these guidelines has become virtually im- 471

[1334] See also NOBEL, § 7 n 172 who sees the Swiss irreproachability guarantee as equivalent to fit and proper requirements.

[1335] Cf. Part 2: I. B. 3.2.1.1. b.

possible. If relevant cases are brought before court, the decisions mostly do not provide the level of detail to determine which behaviour is considered appropriate and which not.[1336] Moreover, in the herein analysed cases it was found that the courts also left the question open on whether a certain behaviour is at conflict with the irreproachability guarantee.[1337] Overall, this makes it difficult or even impossible for the norm addressees to draw the line between permissible and prohibited behaviour under the guarantee for irreproachable business conduct. In addition, the indeterminacy renders it very challenging to establish a suitable standard for judging the legality of the supervisory authority's practices.[1338] Consequently, this vagueness, while offering flexibility, was found to lead to unclear supervisory expectations towards senior management and substantial challenges to determine the legality of the supervisory authority's practices.

472 Another concern is the prevalent *negativist* interpretation of the irreproachability guarantee. This is found to be fundamentally at odds with the guarantee's intended preventive effect and its structural integration into the legal framework as a licensing requirement.[1339] It is understood that this negativist interpretation is mostly due to the provision's historical roots: while the legislator saw a necessity in ensuring that the bank is led by individuals who show a reliable character and are professionally competent, the provision was also setup as a means for the supervisory authority to be empowered to proactively address and take action against incompetent, unreliable or unethical irreproachable persons. Given the developments in financial market law, especially as in the meantime FINMA has been vested with explicit enforcement instruments, this domination of the negativist view is, from the herein perspective, no longer necessary. Such a view can even be considered to be completely inefficient, given the restrictions imposed on FINMA's communication practice. Still, this negativist view remains prevalent, also in the academic discourse.[1340] Given that the irreproachability guarantee is an authorisation requirement, not an enforcement instrument, its primary point of discussion should be in terms of how it embeds in the authorisation process and its function therein in order for it to unfold its preventive effect.

1336 See the just discussed issue on the restricted communication herein Part 5: II. A. 2.1.

1337 Cf. n 321, 346 herein.

1338 See Part 2: I. B. 3.2.1.1. b, Part 2: I. B. 3.2.1.4 for a discussion of the indeterminacy and its perceived limits.

1339 Cf. Part 2: I. A. 1.

1340 See n 194.

Furthermore, the irreproachability guarantee encompasses two elements: professional competence (fitness) and irreproachability (propriety).[1341] The focus on the content and scope of the irreproachability guarantee tends to be skewed towards *professional competence*. This aspect is relatively straightforward, and as just elaborated also included in FINMA-Circ. 17/1, where it is further specified.[1342] However, the content and scope of the second element, the *propriety*, is not further clarified, which points to an imbalance in the regulatory perception of both elements. Furthermore, propriety remains a subject of intense debate, especially regarding moral or ethical dimensions. Analysing FINMA and court practices reveals that at the heart of propriety lies adherence to the law and standards, which constitutes the uncontentious aspect of this element.[1343] The irreproachability guarantee, unique among all provisions, presents a significant opportunity to address standards of conduct in the banking sector. The interplay of cultural norms and behaviour of senior management individuals of firms and the effectiveness of corporate governance frameworks has also been highlighted in the discussion of international bodies.[1344] With the present restrictive and imbalanced interpretation of the irreproachability guarantee, the author finds that a significant opportunity is overlooked to reinforce leadership, values, and behaviour in banks. 473

These observations lead to the question of whether the irreproachability guarantee, in its current setup, practice and understanding, is effective in its preventive means. This prompts the exploration of possible enhancements and a subsequent inquiry into the potential refinement in the approach to the norm. 474

2.2.1.2. Perspectives

To enhance the impact and efficacy of the irreproachability guarantee, the author sees it as vital to align the requirement more closely with its intended preventive effect by clarifying its content, shifting to a positivist interpretation and balancing both of its elements, fitness and propriety. 475

As a first step, Switzerland could codify the current practice with regards to the irreproachability guarantee.[1345] Overall, the focus should be on clarifying the propriety aspect, fostering its balance with the element of professional 476

1341 Cf. Part 2: I. B. 3.2.1.1. a.

1342 Cf. Part 2: I. B. 3.2.1.3. a.

1343 Cf. Part 2: I. B. 3.2.1.3. b for the discussion of this element, as well as Part 2: I. B. 3.2.1.4 regarding the debates around its limits.

1344 Cf. Part 1: II. B. 1 et seq.

1345 Cf. Part 2: I. B. 3.2.1.3 for a detailed discussion of these elements.

competence. The aim should by no means be to conclusively define the irreproachability guarantee, but to describe it more clearly by offering broad reference points. Both of the previously analysed emerging approaches have further clarified the equivalent requirements by broadly formulated conduct rules.[1346] For instance, the UK's approach under the SM&CR underscores the fit and proper requirements with a positive perspective, focusing on specific conduct rules for senior management. Banks are required to contractually bind senior managers and certified functions to adhere to these. While the Netherlands also has conduct rules, these primarily centre around the banker's oath and focus on customer interactions, thereby not directly addressing senior management. Still, both elements (oath and conduct rules) are relevant with regards to a senior managers fitness and propriety.[1347]

477 In establishing the clarification of the norm, the collaborative method employed in the Netherlands for developing and maintaining these standards could be adopted, which could increase industry buy-in and raise awareness.[1348] In establishing how the content could be further specified, FINMA, with its repository of knowledge with years of applying this norm, should be involved, alongside the industry as addressees of these specifications.

478 Subsequently, the legal integration of these enhancements could draw inspiration from existing counterparty licensing requirements, which are generally accompanied by provisions in the Banking Ordinance, or distinct thematic ordinances, as well as FINMA-Circulars.[1349] For an efficient approach, the open-formulated base norm in the Banking Act (BankA 3 II c) could be supplemented with more detailed provisions, either by integrating such into the existing FINMA-Circ. 17/1 or by establishing a specific FINMA-Circular which is dedicated to further elaborate the irreproachability guarantee. This approach would also

1346 Cf. e.g. also BCBS Principles 2015, n 32 et seq., 46, 51 for reference.

1347 Cf. Part 2: III. A. 2 for the discussion of the British and Part 2: III. B for the discussion of the Dutch rules.

1348 See n 120 herein. Furthermore, such conduct rules potentially also have a significant overlap with the existing codes of conduct of banks. Although these codes are likely not aimed at the further elaboration of the irreproachability guarantee provision, such can still exhibit a large thematic synergies.

1349 Pro memoria: The organisational requirements (cf. BankA 3 II a) are accompanied by a section in the Banking Ordinance ("Organisation of Banks", BankO 9-14) and elaborated in FINMA-Circulars, particularly in FINMA-Circ. 17/1 "Corporate Governance – Banks". Regarding capital requirements (cf. BankA 3 II b) there are further norms in the Banking Act itself (cf. especially BankA 4 et seqq.), in the Banking Ordinance ("Capital Requirements", BankO 15-17), and they are specified in additional Ordinances and multiple FINMA-Circulars, see Part 2: I. A herein for an overview.

ensure that FINMA and the industry are involved and can determine the specification. If the setup of the accompanying provisions should be more closely aligned with the one of other licensing requirements, the overarching principles of BankA 3 II c could moreover be further specified in the Banking Ordinance and subsequently also in a (new or revised) FINMA-Circular. While likely more time-consuming, this approach would allow for a balance between broad overarching principles and more specific, actionable guidelines. One possibility is the embedment of specific requirements within the existing structure of the Banking Ordinance. For example, following section "3. Capital Requirements" a subsequent new section explicitly on the requirements regarding the *individuals involved entrusted with the administration and management of the bank* could be introduced. This would not only clarify the requirements but also integrate seamlessly into the current regulatory framework.[1350] From the herein point of view, further specification of BankA 3 II c is not *per se* in conflict with the principle-based regulatory approach. As previously elaborated, other licensing requirements are elaborated extensively, which is also seen as compliant with this approach.[1351] It remains important to adhere to it by choosing the subsequent formulation of these concretising standards.

Adopting these strategies would transform the irreproachability guarantee from a vaguely defined concept into a more concrete and effective regulatory tool. This would set forward a guideline for senior management behaviour, align the guarantee with its intended preventive purpose and contribute to the balancing of both elements. It would also set a more solid foundation for the ensuing supervisory law life cycle phases by providing clearer reference points. 479

2.2.2. *Clear Assignment of Responsibilities*

2.2.2.1. Identified Implications

It was learned that currently the FINMA-Circ. 17/1 delineates duties and responsibilities for boards of directors and executive management, which also encompasses broad aspects of corporate governance. For instance, the board of directors is charged with ensuring proper corporate organisation, while ex- 480

1350 The referenced systematics were identified as follows: following the sequence of licensing requirements in BankA 3 II, the Banking Ordinance further elaborates on these, following the same structure. BankA 3 II a is thus supplemented by the section: "2. Organisation of Banks"; the subsequent requirement in BankA 3 II b is correspondingly supplemented by the "3. Capital Requirements".

1351 See n 147 et seq. herein for an overview.

ecutive management is tasked with developing and upholding adequate internal processes.[1352] However, these responsibilities are generally broadly defined and attributed collectively, rather than to specific senior management roles. Notably, there is no precise allocation of the responsibility for corporate governance *per se* to a designated senior management body or person.[1353] During the authorisation process, while governing bodies are required to delineate their responsibilities (also in the internal framework of a bank), this is not subject to detailed scrutiny by FINMA, with its reviews mainly focusing on traditional organisational structures.[1354]

481 This approach provides a foundation for identifying general responsibilities of senior management. Yet the vague formulations, a lack of specific assignment and supervisory review can lead to gaps in corporate governance and subsequent accountability issues. This situation prompts the question of whether responsibilities, particularly for senior management, could be more explicitly defined and reinforced through direct attribution in the authorisation process.

2.2.2.2. Perspectives

482 As previously highlighted, the British SM&CR places significant emphasis on the explicit identification and assignment of responsibilities of senior management. Consequently, the authorisation phase encompasses comprehensive documentation requirements to clarify the responsibilities for each senior manager individually and throughout the whole institution. Such have to be submitted to the authorities and be kept up to date throughout the whole supervisory law life cycle.[1355] Hence, this setup could serve as a pertinent point of reference for Switzerland to enhance its current setting.

483 According to the view adopted here, assuming such an approach should be subsumed under both, the current personnel requirements of the senior management of banks in BankA 3 II c and organisational requirements in BankA 3

1352 Cf. FINMA-Circ. 17/1, n 9-15 (especially n 11) for the duties of the board of directors and n 47-50 (especially n 50) for the duty of the executive management, see also the detailed discussion herein in n 188 et seqq.

1353 This is opposed to the BCBS, Guidelines 2015, n 23, which clearly allocate the responsibility for corporate governance to the board of directors (among, e.g. the overall strategy of the bank). Also, n 88 requires clarity on the role, authority and responsibilities of the different functions of the executive management.

1354 See n 209 herein.

1355 Cf. Part 2: III. A. 1.1.

II a.[1356] The latter could be used as a starting point. In the manner of a further specification, the existing FINMA-Circ. 17/1 could serve as a basis for evaluating stipulated responsibilities. The currently existing broadly assigned responsibilities to each of the bodies could be further supplemented to encompass them more conclusively.[1357] For example, the BCBS guidelines provide a thorough list of responsibilities, especially for the board of directors, and also clearly assign responsibility for corporate governance to this body.[1358] Additionally, FINMA-Circ. 17/1 could be amended to mandate that these responsibilities must be explicitly assigned to a senior manager in a responsibility document, also including any further responsibilities not foreseen in the Circular. The guidance and template for such could be provided by the supervisory authority. This document would need to be submitted to FINMA, and regularly updated by the bank if changes occur.

To ensure the instrument's effectiveness, this obligation to assign and submit the responsibilities should also be incorporated into the Banking Ordinance. There, the documentation would be listed among the necessary documents to be submitted for both the relevant individuals for the individually allocated responsibilities (cf. BankO 8 I a) and the institution for the overall institutional view of the allocated responsibilities (cf. BankO 8 I b). To ensure that FINMA is always informed of the current status of these documentations, such could also be incorporated into BankA 3 III.[1359] Furthermore, it is important that the instrument is designed to clearly show its connection to BankA 3 II a. The integration of such responsibility documents into the authorisation process 484

1356 In the UK, a first legal point of reference is the provision in the FSMA 2000 regarding "applications for approval". It stipulates that an application for approval regarding a senior management function must include a statement of responsibilities for this person, see FSMA 2000 ss 60 2A-2C, complemented by further guidelines, for details see Part 2: III. A. 1.1 herein.

1357 See n 188 et seq., 190 et seq.

1358 Cf. Part 1: I. C. 2.4.3 for a detailed discussion.

1359 BankA 3 III prescribes which documents must be submitted to FINMA not only during the authorisation process but also later on if changes occur. Such an amendment of the Banking Act would be unnecessary if the modification of a responsibility document were considered a change of substantial importance, as it would then automatically fall under BankO 8a, according to which it would have to be reported to FINMA. Cf. also BERTSCHINGER, SZW 2023, 729-734, who sees the assignments of responsibilities already covered and mandatory under the licensing requirement BankA 3 II a. More specifically the author considers the allocation as crucial part of the internal regulations, which under the current law already have to be approved by FINMA. Consequently, he suggests a specification in the FINMA-Circ. 17/1, but does not see a necessity to adjust the legal foundations.

would require careful legal structuring, to ensure the instrument withstands judicial scrutiny if it is consulted in the course of an enforcement proceeding.[1360]

485 While the creation and maintenance of such documents entail considerable efforts for both the bank and the supervisory authority, the extent varies based on the design and the systematisation of the documentation.[1361] More generally, from the author's point of view the positive aspects outweigh these concerns. By embedding this instrument in the authorisation process it could reach its full preventive potential, which should not be underestimated: submitting responsibilities to the authorities can compel senior management to engage earnestly with these duties from early on. Another preventive effect may arise from senior managers' awareness that the authorities are cognisant of their responsibilities, which could thereby foster diligence in fulfilling these duties.[1362] It also ensures that all mandated responsibilities are (at least formally) assigned within the bank. This initial attribution lays the groundwork for concrete discussions and evaluations of responsibilities during ongoing supervision and also for potential enforcement proceedings, where responsibilities could be subsequently identified from the documentation.[1363] From the perspective of the authorisation phase, the implementation of this instrument could lead to a better understanding and a more thorough examination of senior managements' effective roles and responsibilities within the bank. Furthermore, it could foster a more balanced reciprocity by ensuring active engagement with corporate governance from both the bank's senior management and the supervisory authority, while unequivocally establishing responsibility for these frameworks.

2.2.3. *Increase Scrutiny*

2.2.3.1. Identified Implications

486 The analysis underscored the high theoretical relevance of senior management in the authorisation process, as it is present in two out of three key licensing requirements for banks.[1364] This underscores the need for a thorough

1360 This will be discussed in the following, see Part 5: II. A. 2.4.1.

1361 See also EMMENEGGER, AJP 2022, 830 who highlights the need for appropriate resources in connection with a such approach.

1362 See also REISER, 554 with a similar view.

1363 This will be further discussed in Part 5: II. A. 2.4.1.

1364 Cf. Part 2: I. A. 1 for an overview.

evaluation of senior managers in this phase to ensure competent and upright individuals are installed for the remainder of the supervisory law life cycle. In the current setup, this initial assessment of senior management was found to be characterised by a predominant reliance on document-based evaluation.[1365] This may certainly provide insights into an individual's organisational position and professional competence, as well as potential legal conflicts. However, this method risks the authorisation becoming a mere box-ticking assignment. Moreover, it falls short in definitively assessing a person's suitability, particularly concerning moral competence. While FINMA may utilise additional data, which it obtains in the course of ongoing supervision and then stores in its watch list, critical information, such as reasons for previous employment termination, cannot be stored in this database.[1366] Thereby, the current setup seems primarily aimed at preventing known wrongdoers from assuming senior management roles, casting doubt on its efficacy in identifying potentially problematic individuals.[1367]

Moreover, the current setup relies on audit firms to examine licensing requirements during the authorisation process, in addition to FINMA itself. Despite the supervisory authority setting minimum standards and providing standardised documents to these firms, the dualistic supervisory approach in general is inherently susceptible to conflicts of interest.[1368] In the author's opinion, the issue becomes particularly delicate in the authorisation phase, especially when this evaluation partly involves assessing the personal capacity of senior managers.[1369] It is therefore seen as questionable whether in the current setup an audit firm is really incentivised to critically assess its client, raising questions on the effectiveness of such an approach. 487

1365 Cf. Part 2: I. B. 4.

1366 Cf. Part 3: I. B. 2.2.3.

1367 See also Reiser, 555 who acknowledges that the current approach to assessing the irreproachability guarantee may "at least" prevent known wrongdoers from assuming a respective position.

1368 See n 208 herein for the role of audit firms in the authorisation process; n 256 et seq. for the dualistic supervisory approach in general.

1369 According to the opinion represented here, the fact that the appointed audit firm is solely responsible for conducting the examination in the licensing process, and that there is a cooling off period for certain activities, does not mitigate this situation. Whilst the same firm cannot be commissioned by the bank for a later regulatory audit later (or at least not directly after the initial audit), such audit firms offer a wide range of further services, especially in the consulting area, see also n 208 herein.

488 Consequently, the prevailing approach raises concerns about whether senior management of banks is sufficiently scrutinised in the authorisation procedure and thereby whether its significance has been adequately acknowledged.

2.2.3.2. Perspectives

489 To enhance the scrutiny on senior management in the authorisation phase, the UK has implemented the instrument of regulatory references, which was also endorsed by the FSB as a best practice to address the rolling "bad apples" phenomenon, which describes the movement of individuals in the financial sector with a history of wrongful conduct.[1370] The regulatory references mandate the disclosure of information pertinent to evaluating a candidate's fitness and propriety and aims to prevent individuals with poor conduct records from moving undetected between firms.[1371]

490 In Switzerland, senior management must currently, under BankO 8 I a sec. 3 provide references in the authorisation process. The submission of these references could be optimised to allow FINMA (and not the banks like in the UK), leading the authorisation process, to directly collect extended regulatory references on this person.[1372] The individual in question would have to authorise the authority to do so through a signed consent form.[1373] It is important that this instrument is institutionalised, well-documented and transparent in its setup, as in the UK. The content and scope of the references should be setup to allow the supervisory authority to gain insights to the person's propriety, as this element is currently underrepresented in the authorisation process.

491 Finally, a future perspective involves moving away from involving audit firms in the authorisation process, which could eliminate potential conflicts of interest and enhance oversight. This approach would allow FINMA to develop comparative insights across Swiss banks from the licensing stage, improving the identification and calibration of institutional issues. If excluding audit firms entirely is considered impractical, (globally) systemically important banks should

1370 Cf. FSB, Toolkit 2018, 61 and also herein n 115.

1371 See n 232 herein.

1372 See also Reiser, 554 who is not in favour of assimilating the regulatory references for Switzerland in reference to the UK setup, most importantly because the banks are responsible for the assessments.

1373 A such authorisation would especially have to be in line with labour law (especially CO 328b) and personal data laws (especially FADP). See also FSB, Toolkit 2018, 37 for the suggestion of a similar approach.

be exempt. Any of these changes would not require legal amendments, but would incur changes in the subsequent documentation of FINMA on this process.

These two adjustments in the authorisation process would increase the scrutiny of the supervisory authority towards senior management and could enable FINMA to gain a deeper profound insight into the personas of senior managers, more appropriately reflecting the significant role of these individuals in the licensing requirements and the authorisation process. 492

2.3. Ongoing Supervision

2.3.1. *Institutionalise Ongoing Oversight*

2.3.1.1. Identified Implications

Given that senior management is relevant in the banks' organisational requirements (BankA 3 II a) and moreover has responsibility to provide a guarantee of irreproachable business conduct (BankA 3 II c), it should be subject to oversight practices in the course of ongoing supervision. The importance of ongoing oversight, including conduct of key bank personnel, was moreover found to be widely recognised by FINMA, the Swiss Federal Supreme Court, and at an international level by the FSB.[1374] However, the analysis of the present setup provided a basis to debate whether the current setup is sufficiently institutionalised and adequately captures the pivotal role of senior management in this phase of the supervisory law life cycle, as will be elucidated in the following section. 493

It was found that there is no thorough ongoing supervision of senior management through the corporate governance audit. The guidelines on the topic, while extensive are only vague, with a conclusive review of all aspects only mandatory every six years and hence granting auditors significant discretion. The audit was also found to be a mainly document-based examination.[1375] It lacks a direct connection between corporate governance and the evaluation of practices overseen by senior management. This issue was highlighted by the IMF which questioned if the Swiss approach sufficiently reflects the roles and 494

[1374] For the statement of FINMA see Branson, FINMA Corporate Governance 2015 3 et seq.; of the court see FCD 143 I 253 consid. 6.5.2; of the international body see FSB, Toolkit 2018, 43-44.

[1375] Cf. Part 3: I. B. 1.1.2.

efficacy of senior management. Its recommendations were unequivocal: Switzerland was urged to progress, even against potential resistance, and intensify efforts to elevate the standards of accountability for senior management, ensuring prudent management of firms.[1376] In the author's view, the existing framework falls short in critically examining senior management's crucial role in corporate governance frameworks.

495 The implications raised regarding organisational oversight however only constitute one piece of the puzzle. The analysis of the Swiss regulatory framework reveals a lack of a specific supervisory mechanism dedicated to monitoring the guarantee of irreproachable conduct among bank senior management, with existing measures also not conclusively incorporating this crucial aspect. Professional competence, as it is further specified in FINMA-Circ. 17/1, is subject to oversight (at least theoretically) under the regulatory audit. However, this addresses only one aspect of the irreproachability guarantee, with personal propriety being the other. Furthermore, audit reports must confirm senior management's adherence to irreproachable business conduct.[1377] Yet, from the author's perspective, a mere confirmation indicates a relatively passive manner and not necessarily an active, in-depth evaluation. Even if a thorough assessment is implied by this confirmation, it significantly lacks guidance, as none was identified. Such guidance would be required to ensure efficient oversight in light of the norm's inherent indeterminacy. Consequently, the current system falls short of providing the rigorous, ongoing scrutiny of senior management's irreproachability guarantee, which is vital for maintaining high ethical standards in banking.

496 From these elaborations it is drawn that the current setup regarding ongoing supervision does not sufficiently represent the significance of senior management. This leads to critical gaps and suggests that these individuals, despite their significant role, might be largely unsupervised in this phase of the supervisory law life cycle. In addition, it constitutes a missed opportunity to identify and intervene in potential problems and risks in two of the three key licensing requirements at an early stage, raising questions about the quality and effectiveness of ongoing supervision in the context analysed herein.

1376 IMF, Switzerland Country Report 2019 no. 19/184, n 65, see also herein Part 3: I. B. 1.2.

1377 Regarding this issue in more general terms, see Part 5: II. A. 2.2.1.1, also see Part 3: I. B. 2.1. et seq. for a discussion of the ongoing oversight of the irreproachability guarantee.

2.3.1.2. Perspectives

To fortify the ongoing oversight of senior management through *corporate governance*, Switzerland could consider implementing the IMF's proposal. An explicit written assessment of the effectiveness of senior management bodies could reinforce the role of senior management in their critical functions within corporate governance frameworks.[1378] The examination of the previously discussed assignment of responsibilities in the authorisation phase should also play an important role in this evaluation to ensure accountability throughout the supervisory law life cycle.[1379] Moreover, the assessments of senior management bodies could include the existing self-assessment framework for boards. This could be expanded to encompass not only the board of directors but also executive management, and moreover to not only constitute a self- but rather a third-party assessment, where each body assesses the other, as well as the supervisory authority which would assess both.[1380] These assessments could then be mirrored and challenged, and in guided evaluations of the differing assessments discrepancies and potential issues could be highlighted, offering a basis for required interventions. 497

From the author's point of view, it is crucial that such an assessment is not solely document-based but also includes observations of interactions with senior management. Key areas for evaluation should include the senior management's understanding of the bank's internal structure and governance, their responsibilities, and their ability to identify critical issues. For such oversight, the Netherlands' approach offers considerable potential. Its methodology, which transcends conventional document-based evaluation, allows for deeper insights into institutions, their organisational structures, and their boardrooms.[1381] Selective and situational employment of aspects from this model, such as in instances where standard supervision indicates critical risks or where experience highlights specific issues in systemically important banks, could be beneficial to the efficiency of the Swiss setup. 498

The ongoing oversight of the *irreproachability guarantee* could in the future be integrated into senior management assessment and become a focal point. The subsequent examinations should also incorporate information from the watch list, which could provide indicators for potential problems that require deeper 499

1378 Cf. IMF, Switzerland Country Report 2019 no. 19/184, n 39, see also n 270 herein.
1379 Cf. Part 5: II. A. 2.2.2 for the assignment of responsibilities.
1380 Cf. FINMA-Circ. 17/1, n 28, see also n 189 of this thesis.
1381 See Part 1: II. B. 3.3.2, Part 3: III. B herein for a detailed discussion.

examination during the audit process. An oversight of the irreproachability guarantee could also be facilitated through the suggested refinement of the norm, as it gives a basis to build the audits upon.[1382] It is important to note that, in the author's opinion, the moral component of senior management's conduct can only be effectively evaluated through personal interaction and not solely through a document-based assessment.

500 Such a senior management assessment could be integrated into the existing instrument of the regulatory audit, thereby ensuring reciprocity between the oversight of senior management and corporate governance framework. It would not necessitate adaptations of material law as it integrates within the general ongoing oversight of the licensing requirements.[1383] In line with the present setup, the enhanced regulatory audit could be anchored within the existing framework of audit Circulars and accompanying guidelines, as well as potentially FINMA-Circ. 17/1 to foster clarity and transparency regarding the instrument in general and the examination.

501 Similarly, shifting towards the Dutch approach in ongoing supervision would, in the author's view, not require amendments of material law *de lege lata*. Still, specifying this approach in the form of a Guidance or Circular, either existing or new, would be desirable for reasons of clarity and transparency.[1384] Moreover, implementing such means requires the necessary expertise and resources from the supervisory authorities.

502 With these suggestions, Switzerland could enhance its monitoring of senior management in corporate governance frameworks, install a holistic oversight on the irreproachability guarantee, and supplement its prevalent document-based approach with effective methodologies. This could ensure effective oversight of senior management, where its importance in general, but also more specifically in corporate governance frameworks, is adequately recognised and would facilitate the early recognition of problems in both domains.

1382 Cf. the previous discussion of the irreproachability guarantee in Part 5: II. A. 2.2.1.

1383 Cf. also FINMASA 24 II, FINMA-AO 2 I.

1384 According to FSA 3:17, banks are required to organise operations in such a way that it safeguards controlled and sound business operations. This also includes the implementation of robust governance arrangements. This type of supervision is derived from the continuous adherence to this requirement. In contrast to a set of predetermined regulations, the behaviour and culture supervision in the Netherlands adopts a distinctive approach, anchored in a model developed by the DNB, see Part 1: II. B. 3.3.2 herein.

2.3.2. *Transition to Exclusive Authoritative Oversight*

2.3.2.1. Identified Implications

503 The Swiss supervisory system's dualistic supervisory approach, involving both FINMA and external audit firms in regulatory audits, has generally been identified as problematic, particularly due to the conflict of interest between banks and their auditors. While it is a common practice for FINMA to directly audit (G)-SIBs, there is no legal mandate enforcing this approach. Thereby, concerns remain regarding the inherent conflict of interest in the bank – auditor relationship.[1385] The author views this conflict of interest as especially delicate with regards to the herein relevant topics. Audit firms are mandated by the board of directors. It therefore remains questionable, whether these firms have an incentive to critique their clients, particularly regarding the subjects of corporate governance and personnel requirements, which both show a close link to the personas of senior management.[1386] The IMF has also recognised this conflict as a substantial issue in the current system, but more importantly also pointing out that corporate governance supervision is among the least suitable subjects to be covered by external auditors. Their examinations were found to often not comprehensively assess risk management, internal controls, or internal audit functions.[1387] Furthermore, the dualistic supervisory approach in general was also raised as a potential topic for further review by the expert group on banking stability after the emergency takeover of Credit Suisse by UBS in March 2023. It saw the current setup as hindering the interaction of the banks (herein therefore banks) and FINMA.[1388] Therefore, the author finds that alternatives to the current dualistic supervisory approach should be explored to enhance the effectiveness of ongoing oversight.

2.3.2.2. Perspectives

504 Addressing these issues, the IMF underscores the need for corporate governance oversight to receive more direct intervention from FINMA or its designated mandataries to facilitate an integrated understanding of the bank's overall management and governance efficacy.[1389] It is posited here that only direct audits by FINMA can ensure a review which is free from conflicts of interest.

1385 Cf. Part 3: I. B. 1.1.1.4.
1386 See n 256 et seq.
1387 Cf. IMF, Switzerland Country Report 2019 no. 19/184, n 66, see also n 269 herein.
1388 Cf. Expertengruppe Bankenstabilität, Report 2023, 59, see also n 257 herein.
1389 Cf. IMF, Switzerland Country Report 2019 no. 19/184, n 39, see also n 269 herein.

Even if audit firms were engaged and compensated by FINMA (as opposed to the banks), these firms could still offer additional services (such as consulting) to the institutions. This situation perpetuates the existing conflict of interest, as potential future business opportunities might influence their critical evaluations. As argued in the authorisation process, referring to the similar issue there, a solely authoritative approach seems more suited to identifying potential issues within a bank at an early stage, not only on an institutional level but also in reference to the whole banking sector.[1390]

505 While literature indicates that (G)-SIB audits are frequently conducted directly by FINMA, from the perspective herein it is argued that such practice should not merely be common but exclusive, especially when scrutinising organisational and personnel prerequisites. Adopting a risk-based approach, explicitly excluding audit firms for (G)-SIBs for the oversight of organisational and personnel requirements, could be considered. An amendment to the legal framework is not deemed necessary, as the current legal provisions (cf. BankA 23, FINMASA 24) already accommodate both options. However, clarifying this as a general principle in the relevant audit guidelines could enhance transparency and consistency in practice.[1391] Most likely, this shift would necessitate increased resource allocation for the authority.[1392]

506 By transitioning to a model which clearly establishes authoritative oversight as a general principle to ongoing supervision, the effectiveness of this phase could be further strengthened.

2.4. Enforcement

2.4.1. *Strengthen Accountability*

2.4.1.1. Identified Implications

507 The examination of enforcement mechanisms has revealed that senior management of Swiss banks rarely faces accountability for breaches of BankA 3 II a or c. In the analysed cases, accountability for violations of organisational or personnel requirements was typically established only in conjunction with an additional breach of law, such as in market supervision or corporate law, which then indirectly resulted in a violation of BankA 3 II a or c. Direct accountability

1390 See Part 5: II. A. 2.2.3.
1391 Cf. FINMA-Circ. 13/3.
1392 Similarly also Expertengruppe Bankenstabilität, Report 2023, 59.

for failing to meet organisational or personnel requirements was scarcely evident.[1393] In addition, the practical application of the professional ban demonstrated that to hold senior managers accountable, the violation must be individually attributable to them. In complex organisational structures, such direct attribution becomes challenging.[1394]

While FINMA-Circ. 17/1 outlines senior management's responsibilities, it does not provide a straightforward basis for establishing accountability. A field of tension was identified where responsibility should not automatically dissipate due to multiple hierarchical levels, yet accountability for a legal violation cannot be established solely based on an individual's hierarchical level or position.[1395] The supervisory authority repeatedly voiced that the individual attribution of a severe violation of a supervisory provision regularly poses a challenge. In addition, the SM&CR was broadly suggested as a future instrument to mitigate the hurdle of individual attribution in imposing a professional ban by the expert group on banking stability. Thereby, the supervisory capabilities of FINMA towards systemically relevant banks could be enhanced.[1396] In the author's opinion the present difficulty was recently underscored by FINMA's initiative to document the responsibilities of Credit Suisse's top 600 managers in the course of an enforcement procedure.[1397] However, it remains questionable whether this approach to individual attribution would withstand judicial scrutiny.[1398] 508

However, this situation is just one part of the overall picture. Senior management does not completely evade consequences for violations of BankA 3 II a and c. While these breaches are often attributed to the bank, the measures imposed on the institution can significantly impact the senior managers, po- 509

1393 Cf. Part 4: I. B the analysis of the instruments, more specifically also n 322 et seqq., 409.

1394 Cf. Part 4: I. B. 1.1.3.3 for a detailed discussion.

1395 Cf. also BERTSCHINGER, SZW 2021, 745-747, who advocates for a more open application of this principle, as it was highlighted that for example if in a case the responsibilities dissipate through the layers of an organisation, this already implies an infringement of BankA 3 II a. Also, if a scenario reveals that a senior management was not informed about an important transaction which went wrong, this might indicate inadequate oversight of subordinate areas.

1396 See n 350 herein.

1397 See n 386 herein.

1398 In this setup, it would most likely be qualified as an internal guideline, which, according to the FSC, has no legal effect in court unless the violation of the guideline results in a material legal infringement (see also n 337 herein). It remains unclear to what extent the measure imposed by FINMA must also be complied with by the legal successor of Credit Suisse, following its takeover by UBS, see also n 386 herein.

tentially leading to their loss of employment.[1399] This pattern was particularly evident in the analysis of the instrument under FINMASA 31, which – unlike instruments targeted at individuals – does not require a qualifying severity (an irregularity suffices) of the supervisory violation.[1400]

510 Generally, preferring the institution as the recipient of legal sanctions for violations of BankA 3 II a and c is understandable, as the supervised entities are the subject of financial market supervision, not the individuals. However, the legislator, by introducing instruments that directly address individuals in management capacities, has indeed shown a willingness to hold these individuals accountable.[1401] It often appears that this is not possible, seemingly given the hurdles regarding individual attribution. It might also suggest a general issue with clear assignment of responsibility in Swiss banks. Moreover, the current setup ultimately leads to the situation where senior management is rarely held accountable for their failures with regard to the effective implementation of corporate governance frameworks. It furthermore risks lower-ranking employees being held accountable for decisions made by senior managers, as the latter are typically involved in high-level tasks, setting the framework and policies. Their subordinates (must) act based on these and thereby execute these decisions, rendering them vulnerable for violations that can be attributed to them rather than senior management. This creates a vacuum around senior management accountability.

511 This vacuum might be at least partially filled through the alternative detour of attributing responsibility to the institution, under which individual-affecting measures are imposed. Yet, this ultimately only further accentuates the unsatisfactory situation by indicating that, despite not being directly addressed, the senior management is indeed seen as responsible for the breaches but cannot be held directly accountable. It also raises questions about the procedural rights of the affected individual who may be significantly impacted by the measures.

512 In this context it is worth remembering that the issues were already prevalent in the early 20th century when the Swiss Banking Act was drafted in response to banking crises, where poor bank performance was linked to ill-defined roles and

1399 Cf. Part 4: I. B. 2 as well as n 410 herein.
1400 Cf. Part 4: I. B. 2.1 for a detailed discussion.
1401 The instruments being FINMASA 33, 35.

competencies, along with inadequate oversight through the highest ranking managers.[1402]

Overall, the current framework leads to a diffuse situation of accountability and indicates a high degree of regulatory ambiguity towards holding senior management accountable for violations of BankA 3 II a and c while potentially also undermining corporate governance mechanisms. 513

2.4.1.2. Perspectives

In the post-global financial crisis era, the need to strengthen accountability of senior management individuals of banks has been emphasised, given that despite their pivotal role governance failures, they have previously only seldom been held directly accountable. The lack of direct accountability for senior management has been seen as incentivising unethical behaviour within banks, as management potentially benefitted from supervisory violations, while the institutions bore the sanctions.[1403] The enhancement of senior management accountability has been particularly advocated by the work of the FSB and the G30 as an effective mechanism to prevent misconduct and strengthen the corporate governance of financial institutions.[1404] 514

Similarly, a focus on ensuring accountability has been a driving force behind reforms in the UK. Interestingly, this regime was a response to issues similar to those in Switzerland, where senior managers previously could evade responsibility, hiding behind "accountability firewalls", as individual attribution was difficult to establish.[1405] Today, the regime emphasises individual accountability for senior managers, which is installed during the authorisation process through the allocation of responsibilities and becomes critical during enforcement procedures.[1406] 515

As already elaborated in the discussion of the Swiss authorisation procedure, the predecessor to this enforcement mechanism should be already established in the authorisation procedure, where the responsibilities are clearly defined and allocated to the senior managers.[1407] The elaborations in the context of en- 516

1402 Cf. e.g. LANDMANN, Entwurf BankA 1916, 17, see furthermore Part 2: I. A. 2.1 for a discussion of the role of senior management in the establishment and evolution of the Banking Act.

1403 Cf. Part 1: II. A, Part 1: II. B. 1 for a detailed discussion.

1404 Regarding the FSB's emphasis see n 87 et seqq., regarding the G30's see n 96 et seqq.

1405 See n 106, more generally also Part 1: II. B. 3.2.2.1 for the UK's rationale.

1406 Cf. Part 2: III. A. 1.1 for its discussion in the authorisation process as well as Part 4: III. A for its use in enforcement.

1407 Cf. Part 5: II. A. 2.2.2 for its suggested integration in the authorisation process.

forcement further underscore the necessity for a such approach. The legal integration would consequently be done through its implementation as in the authorisation requirement, and not as an enforcement measure.[1408] Following this hypothetical instalment of the requirement in the authorisation process, the allocated responsibilities could then be consulted in the enforcement procedure and aid in overcoming the hurdle of individual attribution. From the author's perspective this would not mandate further changes to material law of enforcement instruments. Rather it would require establishing their consulting in the imposition of these instruments.[1409] This further highlights the need to install these responsibilities in a manner which withholds judicial scrutiny.

517 These measures could ensure that in the future direct individual accountability of senior management becomes a reality and also clarifies their legal position. Furthermore, it would significantly contribute to the effectiveness of corporate governance frameworks as it enhances reciprocity by ensuring that senior managers can be held accountable for subsequent failures.

2.4.2. *Diversify Enforcement Instruments*

2.4.2.1. Identified Implications

518 The analysis revealed a notable lack of diversity in the enforcement tools used within Swiss financial market supervision. This issue is twofold: firstly, enforcement actions *predominantly* require a *serious* breach of supervisory provisions and, secondly, the *repercussions* for senior management tend to be *uniform*, as will be elaborated in the following section.

519 Currently, almost all enforcement measures require a *serious* violation of supervisory provisions.[1410] An exception generally constitutes the irreproachability procedure, which while not a formally established instrument, but rather a practice, does not mandate a qualified seriousness. Furthermore, for the application of FINMASA 31, the instrument to restore compliance with the law,

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1408 It is thereby referred to FINMA's approach where it has already oriented itself towards the British regime in imposing a measure to allocate the responsibilities of 600 managers within an enforcement procedure, through the instrument of FINMASA 31, see FINMA, Press Release CS Greensill 28.2.2023, 1-4, especially 3; FINMA, Case Report 2022-16, see also n 386 herein.

1409 Cf. Part 4: I. B. 1.1.3.3. a for a definition of the individual attribution, as well as Part 4: I. B. 1.1.3.3. c for its applied use in the context of the professional ban.

1410 Cf. Part 4: I. B. 1.1.3.1. a for a definition and its relevance in the present enforcement instruments.

even a mere irregularity is sufficient. While this measure aims to rectify unlawful situations in supervised entities, when imposed it still often indirectly targets individuals.[1411] As of today, the interpretation of seriousness varies relative to the level of infringement pertinent to each instrument. Notably, for senior managers, the threshold for imposing a professional ban or confiscation is higher compared to the issuance of a declaratory ruling.[1412] Consequently, senior management, despite their regulatory significance, may only be held accountable for severe violations. This potentially overlooks the impact of lesser infringements, as depositors can also be negatively impacted from mere supervisory violations of individuals, and so can the financial market.[1413]

Furthermore, at first glance, it appears as if FINMA has a range of enforcement instruments at its disposal. Yet, in reality, most instruments culminate in the same outcome for senior managers: loss of employment.[1414] This however does not necessarily restrain such individuals from taking on a new role in the financial industry, though possibly not at management level. Another consequence would result from the *confiscation* instrument. It allows for the seizure of profits made from violations, however it has yet to be practically applied in the present context.[1415] Similarly, the *publication of the supervisory ruling* was found to be theoretically feasible in the present context, but has not been utilised accordingly.[1416] Unlike many international counterparts, FINMA lacks the authority to impose fines.[1417] The supervisory authority has expressed interest in acquiring this power and the implementation of fines against *financial institutions* as a possible enforcement instrument was also proposed as a potential means to improve FINMA's supervisory capabilities by the expert group on banking stability. In addition, the IMF has highlighted that the lack of such raises questions about whether Switzerland has sufficiently dissuasive instruments, thereby suggesting the exploration of administrative fines.[1418] Therefore, while senior managers are technically subject to all enforcement instruments, the predominant consequence is their loss of employment. The question arises as to whether this almost uniform outcome acts as a sufficient deterrent for misbehaviour and whether it constitutes an adequate response framework to potentially diverse supervisory law violations. 520

1411 See n 362 et seq. for the irreproachability guarantee and n 393 for FINMASA 31.
1412 See Part 4: I. B. 1.1.3.1. a. (ii) for a further discussion.
1413 See also BERTSCHINGER, SZW 2021, 748 with a similar view.
1414 Cf. in general Part 4: I. B, more specifically also n 411.
1415 Cf. Part 4: I. B. 1.3.3.
1416 Cf. Part 4: I. B. 2.3.3.
1417 See Part 4: I. A. 3.2 for a discussion of fines in Swiss financial market law.
1418 See n 317 herein.

521 Overall, exaggeratedly stated, enforcement against senior management is reduced to the requirement to commit a *severe supervisory law violation*, which most likely *results in job loss*. This monotony overall raises questions on whether the current array of instruments and their theoretical and practical setup is sufficiently diversified.

2.4.2.2. Perspectives

522 Reflecting the existing *practice* of recognising various levels of seriousness, this practice could be adopted to formally differentiate these levels in material law. *De lege ferenda* it could specifically be considered that a mere breach of supervisory law triggers declaratory rulings under FINMASA 32.[1419] This would necessitate legal amendments of this instrument to require a mere violation of supervisory provisions. Concurrently, aligning the personal scope of application of these instruments with existing practices should be considered, which would involve incorporating individuals in management capacity as potential subjects for a declaratory ruling (akin to FINMASA 33 and 35). Such a modification would establish a more nuanced range of severity and would unambiguously communicate to senior management that they may be held accountable through enforcement actions even for minor violations of supervisory law.

523 Furthermore, the range of enforcement instruments could be expanded. Particularly, the introduction of fines and public disclosure of the supervisory ruling, as also practised in both of the emerging approaches (and also in the majority of further jurisdictions), could enhance the diversity of enforcement measures.[1420] Looking at the existing instruments, the question arises whether FINMASA 35, which allows for the seizure of variable compensation components, could act as a substitute for a fine competency. However this instrument is found to be unsuitable for these purposes, given its aim of a compensatory function, as well as the inherent difficulties which make it nearly impossible to accurately determine the respective amount of disgorgement in the researched context.[1421] Consequently, the introduction of a fine would require an instalment of such an instrument in a separate provision in the FINMASA along with the other enforcement instruments, which would subsequently not only be applicable for banks and their senior management but

1419 See also the suggestion in BERTSCHINGER, SZW 2021, 748 et seq.

1420 Both of the emerging approaches have these instruments in their enforcement repertoire, see Part 4: III. A et seq. Cf. also EXPERTENGRUPPE BANKENSTABILITÄT, Report 2023, 58 where these instruments in comparison to further jurisdictions are also noted.

1421 See n 369, 376.

rather all subjects of financial market supervision.[1422] According to the view presented here, it should be refrained from implementing a fine authority directed (only) towards the institution. As the analysis has shown, the effectiveness of such a measure remains highly questionable. The imposition of fines amounting to billions of USD in other jurisdictions has not prevented misbehaviour by senior management. Furthermore, it is primarily the shareholders, not the management, who bear the financial burden of the fines.[1423] Therefore, the added value of such an instrument when designed in this manner cannot be identified.[1424]

524 If it will be found that there are possibilities to install a fine instrument as a means of pecuniary administrative sanctions against individuals, despite the tension between the *nemo tenetur* principle and the duty to cooperate, its design, integration, and impact in relation to the other enforcement instruments must be carefully considered and balanced. For instance, would a senior manager who has been fined still be considered to comply with the guarantee for irreproachable business conduct? How severe must the supervisory law violation be for a fine to be imposed on an individual? Should such an individual consequently also be subject to a professional ban? Considering the diversity of enforcement instruments, the integration of a monetary penalty for individuals would generally be welcomed, as it could provide a wider array of disciplinary actions and act as a significant deterrent for individuals to commit supervisory violations. However, its design constitutes a delicate balancing act, not only in terms of overarching legal principles but also in terms of its integration as an enforcement instrument.

525 In addition to fines, the diversity of instruments could be enriched by utilising FINMASA 34, which allows for the publication of the supervisory ruling. According to the analysis, the theoretical applicability to the present context was affirmed. Yet, it also needs careful balancing with the general restrictions on communications by FINMA which are currently present.[1425] To mitigate poten-

1422 Cf. FINMASA 3.

1423 See also n 75 et seq., 90 et seq., 317 where this is discussed.

1424 The view presented here thereby opposes the one of the Expertengruppe Bankenstabilität, Report 2023, 58, which considers that an uncooperative management would react to such monetary penalties imposed against the institution and consequently suggests the instrument of fines solely towards institutions, see also n 317 herein.

1425 On the problem of restrictive communication in enforcement see Part 4: I. A. 4, as well as Part 5: II. A. 2.1, where the general issue of communication is discussed. Furthermore, see Expertengruppe Bankenstabilität, Report 2023, 58 which refers to FINMASA 34 in the context of the general communication restriction in FINMASA 22 II and underscores that potential legal amendments should be examined.

tial conflicts with the individual person's personal rights (and thereby the FADP), an anonymised practice could be considered. Building upon the acknowledgment of its theoretical feasibility in academic literature, it is assumed that it would solely require a change in practice and no legal amendment. If, however, in the future the intention is for the publication of the supervisory ruling to be the standard practice rather than just an option, the legal text would need to be amended so that it no longer represents a *may* but a *must* (cf. FINMASA 22 II). Besides enriching the enforcement practice, the more frequent publication of supervisory rulings would also enhance the transparency of enforcement practices and thereby positively address the identified issues with communication.

526 It is essential to recognise that merely broadening the range of enforcement, including the introduction of fines, is by no means a panacea to all of the identified issues. Enforcement remains an important aspect of the supervisory law life cycle and it is paramount that both existing and potential new tools can effectively be deployed. Still, the expansion of the enforcement instruments and the subsequent diversification of potential consequences for senior management could allow a more nuanced response to various infractions.

B. The Path to a Cohesive Senior Management Regulation and Supervision

527 The previous elaborations showed possible implications in senior management regulation and supervision and provided possible future avenues, based on the preceding analysis of this work. Change could be achieved through adjustments in the Banking Act and Banking Ordinance, which would promote legal certainty and, together with amendments to existing norms in the FINMA-Circ. 17/1 or in FINMA's policies, foster substantial change. Besides these suggestions, the proposals also recommended changes in practice. It was furthermore emphasised that Switzerland, if it seeks to reform its present framework, should find its own way rather than assuming a system as is from another jurisdiction and consider resources from both the banks and the supervisory authority. Still, the emerging approaches provide a plethora of possibilities to draw inspiration from.

528 The previous detailed discussion identified the key implications in the present Swiss framework and proposals to lead Switzerland to a cohesive approach to senior management regulation and supervision. Overall, it was found crucial to *enhance the quality and quantity of communication* from the supervisory au-

thority, as it could overall positively impact the efficacy of financial market regulation. Thereby, clarity towards supervised entities and their senior management throughout the whole supervisory law life cycle could be fostered, along with providing a discussion basis for academia and making the public aware of potential restraints in financial market supervision.

529 The current *requirements* could benefit from a *refinement of the irreproachability guarantee*, which would level the licensing requirement with its other two counterparties and realign it with its intended regulatory purpose to primarily exert positive, preventive effects. It would transform the irreproachability guarantee from a vaguely defined concept into a more concrete and effective regulatory tool which clearly communicates supervisory expectations towards the individuals it addresses and therefore aid in installing and upholding a high standard of conduct throughout the supervisory law life cycle.

530 In the *authorisation phase* a clear assignment of responsibilities to senior managers could result in a better understanding of the effective roles and responsibilities of these individuals. It would foster a more balanced reciprocity by ensuring active engagement with corporate governance from both the banks' senior management and the supervisory authority, while unequivocally establishing responsibility for these frameworks. The enhanced *scrutiny* on senior management through the establishment of regulatory references and the transition to a solely authoritative initial assessment allows FINMA to gain profound insight into the personas of senior managers. This would more appropriately reflect the significant role of these individuals in the licensing requirements and the subsequent authorisation process.

531 In the course of the *ongoing supervision*, its *institutionalisation* in the herein context suggests installing an effective monitoring of senior management through an enhanced corporate governance audit, which clearly establishes the direct link between this framework and senior management. This also incorporates an examination on and critical challenge of the newly established assignment of responsibilities. Furthermore, the suggestion encompasses the monitoring of the adherence to the irreproachability guarantee, with this oversight being facilitated through the refinement of the provision as a licensing requirement. The enhanced setup would thereby increase the thorough ongoing supervision of senior management and the corporate governance framework and help to identify problems in both domains early on. Furthermore, by *transitioning to a general principle of authoritative oversight* of the herein relevant topics, the efficiency of this phase could be further fostered.

532 Regarding *enforcement* it became clear that the *strengthening of accountability* for senior management is a key mechanism to ensure the effectiveness of existing and potential future instruments. By doing so, the current high degree of regulatory ambiguity is reduced and it would also significantly contribute to the effectiveness of corporate governance frameworks by enhancing their reciprocity with senior management. A *diversification* of enforcement instruments, both regarding their requirements and their consequences, could further contribute to a cohesive framework with a range of possible enforcement actions at FINMA's disposal.

533 Besides these implications, the interaction with the industry and academic discourse warrants consideration. Successful regulatory approaches to senior management have been found to rely on a balanced interplay of legal frameworks, authorities, banks, and academia. Overall, the author sees the most potential in amendments regarding the first two phases of the supervisory law life cycle. Thereby, the emphasis is on a thorough and critical initial assessment, coupled with proactive and preventive strategies which ensure stringent oversight of senior management. More generally, the suggestions highlighted that the current framework could be improved by integrating stronger direct links to senior management under the institutional regulation and especially establish an explicit connection between these individuals and corporate governance frameworks. This would also positively impact the general regulatory clarity towards these individuals.

534 Some of the challenges Switzerland currently faces are not novel – senior management was already a core theme in the initial draft of the Banking Act nearly over a century ago. Political discussions and academic discourse sparked by the instances leading to the recent emergency takeover of Credit Suisse by UBS have since added new momentum. Incorporating the suggestions of the present work would constitute a definite commitment to regulate and supervise senior management of Swiss banks consistently throughout the supervisory law life cycle, both in theory and in practice. Thereby, the importance of these individuals in the institutional requirements would more adequately be reflected. Moreover, implementing the suggestions would lead to a more balanced reciprocity of senior management and corporate governance frameworks, leveraging the efficacy of both. While the research scope of the present work focuses on large banks, many of the identified issues also affect smaller institutions. Thereby, the proposed amendments should also be carefully considered for these banks. The suggested adjustments in summary contribute to a shift, departing from a patchworked and elusive approach towards

a cohesive and clear system of senior management regulation and supervision in Switzerland, serving the supervisory objectives of depositor protection and broader systemic stability.

Summary

The present work commenced by elucidating the herein relevant concepts and analysing prudential corporate governance against its general economic backdrop. It then embarked on a journey to review current developments in corporate governance and senior management in banks. The inquiry has revealed a dynamic international discourse. Central to this discussion has been a growing awareness of the inefficiencies of prudential corporate governance frameworks which were setup in the era after the global financial crisis of 2007-2009. In these, senior management is regulated and supervised through the organisational requirements of these frameworks, along with fit and proper prerequisites. This was considered the *traditional approach* to regulating this group of individuals. 535

Despite the interventions and efforts to enhance governance in financial institutions, the post-global financial crisis era was marked by an unprecedented increase in corporate scandals in banks. These ongoing challenges prompted a regulatory shift to strengthening frameworks and enhancing their efficacy. Notably, the developments encompassed departures from long-standing approaches in financial market supervision: attention has been increasingly directed towards senior management individuals and their accountability, instead of regulating institutions; as well as aspects of conduct and culture, as opposed to measurable and technocratic regulatory frameworks. International bodies, as well as national jurisdictions have taken part in this paradigm shift. The United Kingdom and the Netherlands were found as role models with their *emerging approaches* to tackle the issues. Both enhanced their existing traditional setups with further elements, yet both chose very different avenues: the United Kingdom broadened its classic regulatory toolkit, while the Netherlands employed novel methodologies directed towards the culture and behaviour of a bank and its senior management. 536

After this review of international developments, the present work transitioned its perspective to Switzerland as the main focal point. In analysing the *requirements* affecting senior management, it was found that the subsequent Swiss framework consists of a convergence between organisational and personnel licensing requirements imposed on banks. Today, under the Swiss Banking Act and its accompanying provisions a structured *organisational framework* is mandated for banks and their governing bodies. These stipulations form the cornerstone of corporate governance, thereby exerting an indirect regulatory 537

influence on senior management by imposing certain structures. Moreover, some tasks and responsibilities deriving from the implementation of the framework are assigned to the senior management. In addition, the *personnel requirements* of the banking license, persons entrusted with the administration and management of a bank must provide a guarantee of irreproachable business conduct. This constitutes an inherently indeterminate legal concept, with its exact scope and content remaining disputed. Thereby it is difficult for individuals to derive behavioural standards from this provision.

538 Consequently, the present Swiss model is based on the previously identified traditional approach, regulating senior management through corporate governance and personal requirements, placed upon the bank as an institution. In this, a dual-perspective strategy, anchored in the Banking Act, was identified, which was found to be historically rooted. While senior management already was a focal point in the first draft of the Banking Act over a century ago, there has been a persisting reluctance to regulating these individuals, only allowing for a gradual introduction of requirements. The *authorisation procedure* itself, which reviews the fulfilment of these requirements, relies on document-based evaluations of senior managers. Questions have been raised about whether the current approach is sufficiently efficient and adequately reflects the significance of senior management in the banking license requirements.

539 In reviewing the corresponding authorisation procedures of the emerging approaches, it was found that the UK emphasises stringent entry barriers and accountability for senior management. Through its Senior Managers and Certification Regime (SM&CR) it installs a clear allocation of responsibilities to these individuals in the authorisation process and makes them subject to a special set of conduct rules. The Netherlands highlights ethical conduct by mandating a banker's oath with subsequent conduct rules for all banking employees. For senior managers, such constitute a part of the initial assessment of their fitness and propriety.

540 In the course of *ongoing supervision* of large Swiss banks, FINMA focuses on assuring continuous adherence to licensing requirements. The regulatory audit constitutes the key monitoring mechanism, in which the examination of the organisational requirements plays an important role. However, issues regarding the effectiveness of these audits have been raised, particularly concerning the depth of the review and the missing link of examining the senior management's role in corporate governance responsibilities. As not only FINMA, but also external audit firms may conduct these audits, potential conflict of interests were raised, and it was questioned whether the external audi-

tors were suitable to critically assess corporate governance. Moreover, the analysis was unable to identify a thorough monitoring of the adherence to the *personnel requirements*. While it was indicated that FINMA has broad powers to collect data relevant to assessing senior management's irreproachability guarantee, it has not been found that this data processing constitutes an institutionalised monitoring instrument.

Looking at the emerging models, it was found that while the UK's SM&CR does not install a distinct authoritative oversight mechanism, it does mandate banks to annually recertify senior managers. The Netherlands has employed behaviour and culture risk assessments, especially targeting decision-making and leadership dynamics and allowing for an in-depth view into these institutions, including their board rooms. 541

The analysis of *enforcement* revealed that this constitutes the only phase where FINMA has explicit instruments at its disposal towards individuals in leadership capacity. Theoretically, FINMA might employ various instruments for violations of both the relevant organisational and the personnel requirements. Yet, in practice, such breaches are mainly attributed to the institution, rather than individuals, pointing to challenges in directly holding senior managers accountable. The subsequent measures imposed on the institution were found to potentially still have significant impact on individuals. While there is currently some breadth in the array of instruments, the consequence for senior managers of a such enforcement procedure is mostly the removal from their positions. 542

By reviewing the subsequent emerging approaches, it was found that both model jurisdictions vested their financial market authorities with broad powers and instruments. Moreover, the UK's SM&CR facilitates establishing accountability through the previously allocated responsibilities and the authorities can also enforce conduct rules. Generally, sanctions range up to imprisonment for breaches which caused a bank to fail. Similarly, the Netherlands has a range of traditional enforcement mechanisms available. Furthermore, it enhanced these with a unique and separate disciplinary board for violations of the banker's oath and conduct rules. 543

Senior management of Swiss banks was found to be present in all phases of the supervisory law life cycle. However, in weaving together the threads of the previous analyses it is followed that the current framework renders senior management regulation and supervision inherently complex and opaque, given its interwovenness with the institutional requirements. The setup also potentially creates a regulatory semblance, where senior management appears 544

to be theoretically regulated through the institutional requirements, yet in practice possibly slips through these institutional mechanisms. In addition, the present framework leads to an asymmetric interdisciplinarity between the corporate governance framework and senior management. This creates a kind of vacuum where senior management is more significantly influenced by corporate governance than it is effectively considered responsible for it. Overall, it was found that Switzerland's approach to senior management regulation and supervision is a fragmented one, which allows for potential inefficacies and gaps. This was considered especially problematic as it ultimately raises questions on the efficiency of both, the organisational and the personnel requirements and thereby two out of three key licensing requirements of banks. The identified implications were further elucidated, and subsequent potential future avenues provided. Looking forward, it was recommended that if Switzerland seeks to evolve its setup, it should build upon its existing framework, fortifying it where necessary to achieve a cohesive system that duly acknowledges the significance of senior management in banks. Through such efforts, it can transition from an elusive and fragmented to a cohesive and clear system, one that efficiently serves its supervisory objectives.

Policy Outlook

When the research for the present work commenced in 2021, Switzerland only to a very limited extent engaged in the discourse surrounding the topic of further developing supervisory approaches towards senior management of banks. While the international debate has intensified since 2015, the discussion within Switzerland only has gained momentum following the forced emergency takeover of Credit Suisse by UBS in March 2023. Consequently, briefly after the finalisation of this thesis in January 2024, two reports with relevant policy considerations were published. To conclude the present study and the policy suggestions made herein, a subsequent cursory review of these publications is warranted. Thereby, the thesis is completed with an indication of potential future supervisory policy avenues on bank senior management in light of prudential corporate governance. 545

In April 2024 the "Federal Council report on Bank Stability, including an Evaluation in Accordance with Article 52 of the Banking Act", was published.[1426] The report fulfils the legal obligation for the regular assessment of regulations impacting SIBs in international comparison according to BankA 52. Furthermore, it responds to the postulates from the Parliament which are concerned with the too big to fail regime and further relevant topics. Lastly, the report provides the analysis mandated by the dispatch of the Federal Council from 29 March 2023 concerning supplement IA to the budget of 2023. The report identified significant gaps in the existing too big to fail setup and a clear need to further develop and strengthen the regulatory framework. The subsequent reform proposals are presented along three suggested strategic directions: "strengthening the prevention regime"; "strengthening the liquidity regime"; and "expanding the crisis toolkit".[1427] 546

Earlier, in February 2024, the Financial Stability Board (FSB) published a peer review focusing on Switzerland's adherence to too big to fail reforms for G-SIBs.[1428] It makes recommendations along the topics of "increasing resources 547

1426 At the time of writing (30 April 2024), only the provisional version of the report was available. While an English version of said report was published, it is not conclusive. Therefore, the German version, published on 10 April 2024, is referenced here. It will be cited in the following as: Federal Council, Report TBTF 2024.

1427 Federal Council, Report TBTF 2024, 2 et seq.

1428 See Financial Stability Board, Peer Review of Switzerland, Review Report, published on 29 February 2024, 1 (cited in the following as: FSB, Peer Review 2024).

for supervision, recovery and resolution"; "strengthening the supervisory framework and early intervention powers"; and "enhancing the recovery and resolution framework".[1429]

548 Following, the recommendations from these reports relevant to the topics discussed herein are briefly examined, along the structure of the present work and hence the supervisory law life cycle consisting of the phases authorisation, ongoing supervision and enforcement.

549 Regarding the *requirements and authorisation* of bank senior management in light of prudential corporate governance, the report of the Swiss Federal Council generally emphasises the significant importance of corporate governance, particularly in the case of SIBs. It advocates for a strengthening of both the legal foundations as well as the content of FINMA-Circulars, taking into account international standards.[1430] In a general manner it is proposed that certain provisions from relevant Circulars (including FINMA-Circ. 17/1) be elevated to a higher normative level. Furthermore, it is considered that individual rules should be more precise and specific, for example, concerning the independence of board members and responsibilities related to establishing a sustainable corporate culture.[1431] Additionally, legal requirements concerning compensation systems ought to be enhanced. Such should apply to the employees in the financial sector (and hence are not limited to senior management).[1432] Also, it is recommended that the guarantee for irreproachable business conduct requirement for the bank itself should be explicitly anchored in the Banking Act and detailed further in the Banking Ordinance.[1433] It is unclear to what extent such specifications are also considered for the guarantee of irreproachable business conduct of individuals (cf. BankA 3 II c).[1434]

550 Regarding *ongoing supervision*, the report of the Federal Council proposed that the legal foundation for the preliminary approval of changes of irreproachability persons should be strengthened. Specifically, it is suggested that BankO 8a, which outlines the reporting and approval obligations for such changes, is elevated into the Banking Act.[1435] It also addressed the dualistic su-

1429 FSB, Peer Review 2024, 3, 30.
1430 Federal Council, Report TBTF 2024, 240.
1431 Federal Council, Report TBTF 2024, 241.
1432 Federal Council, Report TBTF 2024, 265.
1433 Federal Council, Report TBTF 2024, 292 et seq.
1434 See Part 5: II. A. 2.2.1 herein, where the further specification of the irreproachability guarantee with regards to individuals is discussed.
1435 Federal Council, Report TBTF 2024, 292 et seq.

pervisory system and presented two proposals to be considered. Firstly, it is suggested that conflicts of interest could be mitigated by allowing FINMA to directly appoint auditing firms. However, it is recognised that such a measure might only be effective to a limited extent.[1436] Secondly, there is a proposal to completely abolish the dualistic supervisory system and move towards an ongoing supervision exclusively by the supervisory authority. However, the report recognises several obstacles for this path, for example, it would require a significant increase in resources of FINMA. Consequently, it is concluded that this measure should initially be assessed primarily for SIBs.[1437] The topic of the dualistic supervisory system is also discussed in the FSB report. Similar to one of the Federal Councils' proposals it found that FINMA should revise its use of external audit firms for the supervision of banks and suggests that audit firms are directly contracted and paid by the authority to address the issues with conflicts of interest.[1438] More broadly in the context of ongoing supervision the FSB also noted that FINMA should be enabled to intervene earlier with appropriate measures, for example with powers to replace the management board or to appoint of a temporary administrator. Even if such powers are not used, the FSB attributes such a preventive, disciplinary effect.[1439] Also, it advocates for FINMA to be enabled to directly supervise the senior bank management responsible for managing relevant risk.[1440]

Both publications also make several suggestions regarding the *enforcement* phase. The current regulatory setup and practice regarding communication in this phase is criticised as too restrictive by the Federal Council report. Therefore, it is proposed to reverse the legal foundation so that the publication of completed enforcement proceedings constitutes the principle, with restrictions allowed only in exceptional cases. Additionally, FINMA should be enabled to inform about investigations and the initiation of proceedings.[1441] Similarly, the FSB report also views it as important that FINMA is granted the power to 551

1436 Federal Council, Report TBTF 2024, 305-307; cf. n 504 of this thesis where a similar view is presented.

1437 Federal Council, Report TBTF 2024, 307-308; cf. Part 5: II. A. 2.3.2 herein for an analogous proposal.

1438 FSB, Peer Review 2024, 32.

1439 FSB, Peer Review 2024, 31.

1440 FSB, Peer Review 2024, 30, the report also references the findings of the IMF, Switzerland Country Report 2019 no. 19/184, said report is discussed herein in Part 3: I. B. 1.2. Furthermore, cf. Part 5: II. A. 2.3.1 of the present work, where it is also proposed that the supervisory authority should directly supervise bank senior management.

1441 Federal Council, Report TBTF 2024, 275; for a further discussion of the issues with limited communication see also Part 5: II. A. 2.1 of this thesis.

publish its enforcement proceedings and establish publication as the main principle, a tool which is viewed as an effective deterrent in other jurisdictions. By doing so, undesirable behaviours in the financial market can be highlighted and a clear message on conduct is sent.[1442]

552 Furthermore, to facilitate the individual attribution of breaches of rules, the report of the Federal Council proposes an accountability regime to be established at the statutory level as an explicit organisational requirement for institutions. This measure aims to ensure a clear assignment of responsibilities, particularly to individuals at the highest organisational levels, recognising the practical difficulties in proving individual breaches of rules.[1443] The UK is considered a model jurisdiction for a such instrument.[1444] Similarly, the FSB report advocates to introduce a senior managers regime in order to facilitate taking action against individual managers who fail their duties. It furthermore views it as conducive to strengthening the corporate culture within banks.[1445]

553 Regarding existing instruments, the report of the Federal Council suggests that the prohibition from practising a profession (cf. FINMASA 33) is aligned with the prohibition from performing an activity (cf. FINMASA 33a). Consequently, the former would be amended so that it can also be imposed when internal rules are severely violated (as opposed to only for severe violations of supervisory law). Also, in cases of repeated violations it should be possible to permanently impose a professional ban, which is already the case under the activity ban.[1446] Concerning the expansion of enforcement instruments, the Federal Council report proposes that FINMA be equipped with the instrument of pecuniary administrative sanctions against legal entities. The introduction of fines against individuals is considered more complex, given the extensive constitutional and conventional rights of individuals. Also, concerns are raised that such measures might restrict the duty of cooperation to an extent that could complicate the investigation of material facts. Consequently, it is not recommended to introduce fines against individuals. Overall, fines are not

1442 FSB, Peer Review 2024, 31.

1443 Federal Council, Report TBTF 2024, 250, 255. In this context the report refers to the Postulate 21.3893 from Andrey Gerhard in the National Council from 18.6.2021, which is also discussed in the present thesis, see n 447, fn 19, 373, 980. Furthermore, cf. Part 5: II. A. 2.2.2 and Part 5: II. A. 2.4.1 herein for a similar proposal.

1444 Federal Council, Report TBTF 2024, 251.

1445 FSB, Peer Review 2024, 31.

1446 Federal Council, Report TBTF 2024, 288.

viewed as a central reform measure.[1447] The FSB similarly recognises that FINMA lacks the power to impose fines. While it does not explicitly advocate for the implementation of such it generally highlights the need to expand the instruments available to the supervisory authority.[1448]

554 On a final note, it is worth mentioning that the crisis surrounding Credit Suisse in Switzerland seems to have been acting as a catalyst for discussing cultural aspects within financial institutions from a regulatory perspective. As laid out in this thesis, this topic has remained significantly underrepresented in the Swiss discourse.[1449] In its herein discussed roughly 340-pages report, the Federal Council mentions "culture" thirty times.[1450] Mostly, the term is referenced in the context of risk culture or corporate culture, but also more specifically in connection with corporate governance or the responsibility of senior management in financial institutions. For example, it is highlighted that recent banking crises have demonstrated that deficiencies in corporate governance, particularly deficiencies in risk management and corporate culture (e.g. excessive risk appetite or a lack of accountability culture), can constitute central causes of such instances.[1451] Whether this effectively signifies a paradigm shift, similar to the one which has been observed with increasing intensity internationally since 2015, remains to be seen.

555 Concluding it is held that, while the aforementioned reports are not explicitly concerned with the topic researched herein, they still suggest reforms and instruments which also have the potential to strengthen the regulatory approach towards bank senior management in light of prudential corporate governance. This is seen as a confirmation that the current Swiss setup is generally in need of reform, a finding which is also echoed in this work.[1452] In the discussion of the future policies to reform the regulatory system it is crucial to give the organisational and personnel licensing requirements of banks the same attention and scrutiny as their third counterpart, the capital and liquidity requirements. Only then the reform has the potential to more effectively

1447 FEDERAL COUNCIL, Report TBTF 2024, 282-284. In this context (cf. p. 269, 277 of the report) the Postulate 21.4628 from Birrer-Heimo Priska in the National Council from 17.12.2021 is referred, which is also discussed in the present work, see fn 19, 980. Furthermore, for a discussion of fines as a future instrument see also Part 5: II. A. 2.4.2 herein.

1448 FSB, Peer Review 2024, 31; for proposals on the further enhancement of enforcement instruments see Part 5: II. A. 2.4.2 herein.

1449 See n 449 et seq. herein.

1450 Cf. FEDERAL COUNCIL, Report TBTF 2024.

1451 FEDERAL COUNCIL, Report TBTF 2024, 41.

1452 Cf. Part 5: I. C. 3 herein.

protect the interests of depositors and the financial market as a whole. With reference to the previous remarks on the future perspectives for Switzerland's framework, it lastly must be emphasised that the momentum should not only be used to reactively respond to deficiencies the recent crisis has, more or less obviously, exposed. Rather, it should be used to proactively reflect on and subsequently effectively reform the fragmented entirety of the Swiss supervisory law framework regarding senior management of banks in light of prudential corporate governance.[1453]

[1453] See Part 5: II of the present work for a thorough discussion.

Ongoing conduct issues in the banking sector have sparked global discussions on the effectiveness of the corporate governance of these institutions. This dissertation commences by exploring the internationally evolving regulatory landscape of prudential corporate governance and the role of bank senior management within these frameworks using a law and economics perspective. Two model jurisdictions, the United Kingdom and the Netherlands, are identified as pioneers with their emerging approaches to tackle the persisting challenges.

Against this backdrop, the study turns to Switzerland. It fills the gap of a comprehensive supervisory law analysis of bank senior management. For this purpose, the fragmented provisions are distilled from their institutional embedding and structured along the supervisory law life cycle of authorisation, ongoing supervision and enforcement. Along each phase, the respective novel approaches from the model jurisdictions are presented.

Through these analyses, the dissertation identifies gaps and inefficiencies in the Swiss supervisory law framework. These findings are synthesised in order to gain a holistic view of the current setup. Concluding, future pathways for Switzerland are presented, also inspired by international developments, to propose a more structured, robust and efficient framework for the regulatory oversight of the senior management of Swiss banks.