

Together, these contributions offer a comprehensive and critical perspective on the path forward for Swiss banking regulation, highlighting the complex balancing act between enhancing stability, ensuring accountability, and maintaining an effective and efficient supervisory model.

The Editors

EARLY INTERVENTION REGIME

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On 6 June 2025, the Swiss Federal Council published proposed additional powers for the Swiss Financial Market Supervisory Authority FINMA. This article assesses the intended early intervention regime.

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1) Proposed early intervention regime

The key parameters determined by the Federal Council to improve the Swiss too big to fail regime include additional powers for the Swiss Financial Market Supervisory Authority FINMA, like an early intervention regime (see Federal Department of Finance FDF, The Federal Council's parameters for amendments to the Banking Act, Implementing the measures highlighted in the Federal Council's report on banking stability and the report by the Parliamentary Investigation Committee, 6 June 2025, 4). Such early intervention regime is to be implemented at the legislative level and cover all banks. By legally anchoring the relevant measures, their applicability and timing, FINMA's options for early intervention, in particular enforceability and legally effective intervention, should be strengthened. According to the Federal Council the objective of this measure consists of avoiding as far as possible a crisis arising because of bank-specific issues or misconduct. Therefore, the existing supervisory powers should be strengthened in areas such as corporate governance (e.g. remuneration and restrictions on business activity), capitalization (e.g. limitations on dividends and Pillar 2 add-ons) as well as recovery and resolution planning, defining the prerequisites more precisely and reinforcing FINMA's powers of intervention and their enforceability in ongoing supervision.

Specifically, alike the regulations for insurance companies, it shall be clarified in the Banking Act (BankA) that protective measures apply before the measures for banks at risk of insolvency. This should ensure that FINMA's intervention to secure the restructuring of a bank is effective. Secondly, the protective measures are intended to be expanded. Protective measures should include triggering recovery plan measures, preventing distributions of equity or dividends or

convening a general meeting. In addition, the suspensive effect of an appeal is intended to be repealed. However, the aggrieved party should be able to apply to the court for restoration of the suspensive effect. Finally, the mentioned measures are meant to be implemented by amendments to various articles in the BankA and ordinances, specifically in the Banking Ordinance (BankO) and the Capital Adequacy Ordinance (CAO).

2) Assessment

The following assessment is mainly based on Nina Reiser/Seraina Grünewald, *Frühintervention*, in: SZW Sonderheft 2025, 48 – 60, and Nina Reiser/Thomas Berndt, *Braucht die FINMA neue Krisenwarnindikatoren und Aufsichtsinstrumente für Banken in der Krise? Interdisziplinäre Gedankenanstösse*, in: GesKR 2024, 255 – 269 with further references. However, both articles were published before the described, proposed early intervention regime by the Federal Council from June 2025.

Weaknesses in risk culture, governance and business models are a frequent cause of problems to banks – this applies also to Credit Suisse. However, this is not the only case. In the European Banking Union, for example, several bank failures can ultimately be traced back to governance problems and a poor risk culture. The problems at Silicon Valley Bank, which was wound up by the US authorities in spring 2023, also stemmed from a flawed strategy and fundamental errors in risk management. Early intervention aims to prevent financial problems from arising in the first place by tackling their root causes. While early intervention in a broader sense begins during ongoing supervision, early intervention in a narrower sense refers to a subsequent escalation phase. The public debate should address both instruments, because the two phases are closely linked and ideally coordinated.

a) Legal loopholes in the applicable FINMA instruments

In its ongoing supervision, FINMA can only indirectly work to eliminate deficiencies in a bank's corporate governance, strategy, and culture. However, it is precisely such shortcomings that are frequent causes of problems at banks. The implementation of sufficiently effective and legally secure measures in ongoing supervision therefore also requires more specific material requirements for corporate governance of banks and the elevation of the essential prerequisites currently standardized in the Circular 2017/1 Corporate governance – banks to legislation or at least ordinance level.

Enforcement, on the other hand, is slow, requires a violation of law by the bank, and therefore places a heavy burden of proof on FINMA. In contrast, early intervention serves the urgent preventive purpose of averting danger, ideally before supervisory law is (seriously) violated and the breach is proven. Furthermore, problems to banks do not always arise in connection with rule violations. Rather, they can also be traced back to other grievances, such as an incorrect strategy or internal cultural problems at the bank. Problems due to external circumstances such as political conditions are also conceivable. In particular, the *de lege lata* vaguely formulated restoration of compliance with the law according to article 31 of the Financial Market Supervision Act

(FINMASA) does not provide a sufficient legal basis for early intervention. Finally, enforcement proceedings are also too slow due to the principle of suspensive effect in appeal proceedings before the Federal Administrative Court. Unlike the European Union (EU), Switzerland also lacks an instrument that can be used as a “means of escalation” in a looming crisis.

For the stabilization phase, *i.e.*, in the early stages of a crisis, systemically important banks have a stabilization plan. This plan contains measures that the banks concerned can use in a crisis to stabilize themselves to such an extent that they can continue their business activities without government intervention. Indeed, early intervention is related to the stabilization phase but may be appropriate even before that. *De lege lata*, the bank itself determines in the stabilization plan the triggers for the stabilization measures to be taken. However, FINMA lacks the legal authority to trigger such measures against the will of the bank. Similarly, FINMA cannot, under current law, order the correction of deficiencies in the bank’s stabilization planning.

In addition to the instruments mentioned for banks in going concern, there are also insolvency proceedings. A bank enters these proceedings at the so-called point of non-viability (PONV), *i.e.*, when it is no longer able to survive independently. In the event of insolvency risk, FINMA may, pursuant to article 25 BankA, order protective measures, a restructuring procedure or, as a last resort, bankruptcy liquidation. In contrast, early intervention is intended to prevent the need for insolvency measures. However, it does not necessarily have to precede them. Intervention with protective measures within the meaning of article 26 BankA only in the event of a risk of insolvency comes far too late, especially in the case of corporate governance problems that arise much earlier.

b) Design of a Swiss early intervention regime

Firstly, FINMA should be granted broad discretion in triggering early intervention measures. These triggers should be forward-looking, dynamic, comparable with peers, and designed to provide an overall view of a bank’s condition. Hard triggers are neither proportionate nor convenient to implement. Instead of an automatic mechanism, FINMA’s discretion should be guided by investigation, documentation, and information requirements for systemically important banks within the steering committee, *i.e.* vis-à-vis the FDF and the Swiss National Bank, as well as within FINMA itself.

Legally binding, concrete measures of varying degrees of intervention are needed. In particular, the instruments currently provided for as protective measures in the event of insolvency risk according to article 26 BankA could be considered as early intervention measures, with a few adjustments and additions. Specifically, FINMA should be able to issue instructions to the governing bodies of the bank (lit. a), appoint an investigator (lit. b), strip governing bodies of their power to legally represent the bank or remove them from office (lit. c), dismiss the banking-act or company-law audit firm (lit. d), limit the bank’s business activities (lit. e) or forbid the bank to make or accept payments or undertake security trades (lit. f). On the other hand, the following measures are not considered appropriate as early intervention measures and should therefore not be adopted: closure of the bank (lit. g) and deferment of payments or payment extensions (lit. h). The prohibition on making payments should also include the possibility of

prohibiting the payment of dividends to shareholders, as proposed by the Federal Council, and bonuses to members of the executive board. Even though the list of early intervention measures, like the list of protective measures under article 26 para. 1 BankA, is not intended to be exhaustive, it should be explicitly supplemented with several measures for reasons of legal certainty. For example, FINMA should, in accordance with the EU regulation and the proposition of the Federal Council, be able to convene a general meeting even against the will of the bank's management and put a capital increase on the agenda. In addition, an explicit legal basis should be created allowing FINMA to explicitly write off Additional Tier 1 (AT 1) bonds. FINMA should also be authorized to order the implementation of individual measures in a bank's stabilization plan as a binding early intervention measure.

Moreover, in line with the proposal of the Federal Council the target group should not be limited to systemically important banks. Rather, the risk-oriented approach in supervision should also be applied in principle to early intervention.

Like protective measures in the event of insolvency risk, early intervention measures are also inherently urgent in terms of both substance and timing. It is therefore only logical to remove the suspensive effect from these measures as well. However, in line with the proposal of the Federal Council the aggrieved party should be able to apply to the court for restoration of the suspensive effect. Yet, early intervention by FINMA is of little use if the bank can take the wind out of its sails by challenging the measure. Early intervention must take effect immediately. For example, the dispute between FINMA and PostFinance over the methodologically correct measurement of interest rate risks and their backing with own funds lasted more than eight years (!) from FINMA's initial ruling to the final Federal Supreme Court ruling (BGer 2C_283/2023, 20.11.2024).

Finally, FINMA should be able to publish early intervention measures if this is necessary for their enforcement or for the protection of third parties. However, if publication would defeat their purpose, FINMA should have the discretion to refrain from doing so. This corresponds to the regulation *de lege lata* for protective measures in the event of insolvency risk.

3) Conclusion

Although FINMA has instruments at its disposal for corrective action in terms of supervision and enforcement, there are legal gaps for FINMA to intervene at an early stage and thus mitigate both likelihood and scale of problems at banks. It is therefore to be welcomed that the Federal Council's key points propose the implementation of an early intervention regime at the legislative level applicable to all banks. The difficulty in designing early intervention measures lies in the fact that responsibility for risk management and business strategy must not be shifted to FINMA but must remain with the bank. The present proposal for the concrete design of a Swiss early intervention regime, which the author developed together with Seraina Grünewald and Thomas Berndt, attempt to strike this balance as best as possible.

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