FINMA's Enforcement in Court

An empirical and legal assessment of the court rulings regarding the Swiss Financial Markets Supervisory Authority's financial regulation enforcement

Urs Zulauf | Roy Gava*

"No judge writes on a wholly clean slate."[1]

This article presents an empirical and qualitative analysis of the judicial review of the Swiss Financial Markets Supervisory Authority's (FINMA) enforcement of financial market laws by the Federal Administrative Court and the Federal Supreme Court. It is part of a broader research project on global enforcement against financial institutions and their managers and employees. Based on an overview of FINMA's enforcement, the appeal rate against FINMA decisions and the success rate of such complaints is discussed. In addition, the article analyses key areas in which the courts have supported or set limits to FINMA practices. Statements on the right to a fair trial and the scope of FINMA's discretion are the object of a special analysis. In an overall assessment, the authors come to the conclusion that, despite FINMA's relatively high success rate in court, there is an effective judicial control over its enforcement.

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I. Background: enforcement against the financial industry

This paper is an empirical study of regulatory enforcement against the financial industry in Switzerland.[2] It combines quantitative and legal analyses to examine how appeals against FINMA enforcement proceedings are reviewed by the courts. As opposed to examining the specificities of individual cases, we seek to contribute to our understanding of the big picture of enforcement policy in the area of financial supervision.

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1 *Felix Frankfurter,* US Supreme Court Justice 1939–1962 appointed by F.D. Roosevelt, The Commerce Clause under Marshall, Taney and Waite, Chapel Hill, University of North Carolina Press (1937), 12.

2 This paper is an output of the Swiss National Science Foundation project "Global Enforcement against the Financial Industry" (project 182252). The authors acknowledge the financial support of the Centre for Banking and Financial Law, University of Geneva. The data collection could not have been conducted without the precious research assistance of *Christophe Chatelanat, Robin Juchler* and *Luca Schadegg*. The authors are also indebted to FINMA's Enforcement Division for the provision of enforcement case summaries for the period 2009–2013. Finally, they thank *Claudia Fritsche, Patric Eymann* and *Michael Kunz* for their valuable comments made on a draft version.

To what extent are supervisory decisions contested? What are the chances of overturning these decisions in court? These research questions have clear implications for both analysts and practitioners of financial law. By means of its empirical focus, the paper aims to contribute to the debate on enforcement policy in three ways. First, international research firms and academics have often performed empirical assessments on the volume and trends of regulatory enforcement against the financial industry.[3] However, most of these studies privilege Anglo-Saxon jurisdictions and, to the best of our knowledge, rarely discuss the judicial review of supervisors' enforcement decisions. Second, the few Swiss studies adopting a quantitative approach to assess the fate of administrative decisions before the courts have not covered banking and financial law.[4] Third, the empirical exploration advanced in this paper combines the added value of a quantitative overview with insights derived from a traditional legal analysis.

The paper is structured as follows. After describing the data sources (section II), the paper offers a bird's eye view of FINMA's enforcement activity (section III). This is followed by an exploration of the extent to which the agency's decisions have been challenged by appeals (section IV). The focus then moves to the empirical assessment of the number and outcome of court rulings related to FINMA, before both the *Federal Administrative Court and the Federal Supreme Court* (sections V and VI). The next two sections adopt a qualitative approach to discuss three issues in which the FINMA's decision-making was either supported or restricted by means of court rulings (sections VII and VIII). Sections IX and X focus on the judicial review of two specific issues that have often been the object of debate in relation to FINMA's enforcement: the fairness and the discretion of the supervisor. Last but not least, section XI concludes with a general reflection on what to take away from this first empirical assessment.

II. Financial enforcement and judicial review: data sources

Our empirical analyses are based on an original database of enforcement cases on financial supervision in Switzerland. The database includes the enforcement *rulings*[5] of FINMA from when it first began its activities in 2009 up to 2017. *Court rulings* resulting from appeals against FINMA's *rulings* before the *Federal Administrative Court* and the *Federal Supreme Court* between 2009 and 2018 are also covered. All decisions were the object of an individual assessment by a small team of coders who systematically reviewed the documents and classified them into different categories of interest. Court rulings related to FINMA's enforcement decisions were obtained by a keyword search directly from the respective court websites,[6] covering the period 2009–2018. The information from FINMA enforcement cases was taken from two different sources:

(1) Since 2014, FINMA has published an annual enforcement report with short case summaries.[7] Among other information on its enforcement policy and outputs, such as a series of aggregate statistics, these enforcement reports include a list of anonymized final rulings issued by FINMA. The case reports contain basic information for each final ruling, such as

3 See for example *John Coffee,* Law and the Market: The Impact of Enforcement, University of Pennsylvania Law Review, Vol. 156, No. 2, December 2007.

4 *Thierry Tanquerel/Frederic Varone/Arun Bolkensteyn/Karin Byland,* Le contentieux administratif judiciare en Suisse: une analyse empirique, Schulthess Zurich 2011.

5 Since we plan to extend our study to foreign jurisdictions in the future, English is the working language of our research project. Appendix 1 to this paper includes a table indicating for all the *terms in italic font,* the official Swiss legal terms in both German and French.

6 Federal Administrative Court: *<https://www.bvger.ch/bvger/fr/home/jurisprudence/entscheiddatenbank-bvger.html>;* Federal Supreme Court: *<https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php>,* Last accessed on 15 January 2019.

7 See "Enforcement reports", available at *<https://www.finma.ch/en/documentation/finma-publications/reports/enforcement-reports/>,* last accessed on 21 January 2019. FINMA annually publishes summaries for all of its final rulings in the form of case summaries, with the exception of cases of *international cooperation*, for which only a selection of cases is made available. Note that enforcement proceedings that are abandoned are not published. Moreover, two enforcement cases were not published in 2015. In addition, note that FINMA has taken some supervisory rulings, which have been subject to appeals, outside normal enforcement processes. These rulings are therefore not included in the enforcement reports (see e.g. Postfinance/interest rate risk case: FAC, B-5595/2016, 14 March 2018; FSC, 2C_387/2018, 18 December 2018).

the date of the ruling, its main topic, the measures taken by FINMA and whether the ruling entered into force or was challenged before the courts.

(2) While FINMA's enforcement report has been published annually since 2014, we aim to take a long-term view of the agency's enforcement activity. Upon request, FINMA made a dataset of anonymized case summaries available for the period 2009–2013. This dataset contained, except for rulings regarding *international cooperation,* basic information similar to that included in the case summaries published in the enforcement reports since 2014. Given that small differences in the reporting between the two data sources for FINMA case summaries for the periods 2009–2013 and 2014–2017 cannot be ruled out, we include the data for 2009–2013 for the sake of completeness and report separate analyses for the two time periods.

III. FINMA's enforcement rulings

Based on the case summaries of FINMA enforcement, Figure 1 gives an overview of enforcement rulings for the period 2009–2017.[8] Our database of FINMA enforcement cases covers 380 final rulings for the period 2009–2017. The number of enforcement cases seems to have reached a peak around 2013–2015 and since then, a tendency towards a decreasing number of cases per year is observable.[9] It is crucial to bear in mind that the number of enforcement rulings is only one way of measuring enforcement activity. In particular, it does not provide much information on important dimensions of enforcement policy that could hint at how the supervisor's enforcement intensity has developed. For example, each ruling has the same weight, disregarding the gravity of the infringement, the severity of the measures taken by the supervisor or the complexity of the investigation. Nevertheless, this figure remains a useful indicator for contextualizing our discussion of court decisions on financial supervision, since the number of rulings may directly affect the volume of appeals reaching the courts' agenda.

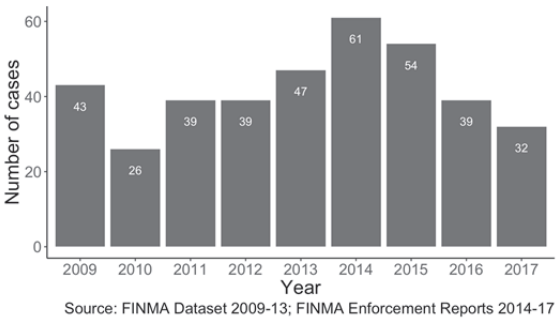

Figure 1: FINMA enforcement cases

By assessing the case summaries from the enforcement reports for 2014–2017 with the additional FINMA dataset for 2009–2013, we can explore how FINMA's enforcement activity has been distributed in different regulatory topics that fall under the agency's mandate.[10] With the ambition of performing comparative analysis with other jurisdictions in the future, we developed a classification of financial regulatory issues and classified each ruling in one of the following categories:

– *Unauthorized activity: C*ases where FINMA enforces financial markets law against firms, their directors or shareholders for carrying out activities requiring a license without being authorized by FINMA and without complying with the licensing requirements. Chasing unauthorized activity is an ongoing concern of FINMA, with 389 investigated firms and 35 decisions every year on average since 2014.[11]
– *Prudential rules:* Enforcement cases mostly against supervised firms for breaches of various types of prudential rules such as capital standards, audit standards or other supervisory rules. It includes business conduct rules. Rules on con-

8 Given that the list of case summaries related to *international cooperation* included in the FINMA enforcement reports is not comprehensive, this category is excluded from the analysis of sections III and IV. However, as the data on international cooperation is accessible for the courts, we included these cases in our analysis of the courts' decisions in sections V to X.

9 Not yet public information provided by FINMA indicates that the enforcement cases have increased again in 2018. Details will be provided in the enforcement report 2018, which is likely to be published in April or May 2019.

10 Note that we decided to retain what could be considered as the main or primary regulatory topic of the enforcement ruling. This mutually exclusive categorization does not reflect the fact that enforcement rulings may have more than one relevant topic.

11 FINMA-Enforcement reports 2014–2017, (2017 p. 34 and 40), <*https://www.finma.ch/en/documentation/finma-publications/reports/enforcement-reports/*>.

trols, organization and risk are excluded and treated as an own category as they have become a regular basis of FINMA's enforcement.
- *Controls/organization/risk:* A subset of prudential rules on internal controls, organization and risk increasingly enforced by FINMA in combination of fit and proper rules (included in this category) in the context of cross-border risks.
- *Bankruptcy:* Today, FINMA is in exclusive charge of bankruptcy proceedings under the Banking Act 1934,[12] the Insurance Supervision Act 2004,[13] the Financial Markets Infrastructure Act 2015[14] and the Collective Investment Act 2006[15] and increasingly enforcing these rules in particular, but not exclusively, against firms exercising unauthorized activities.
- *Anti-money laundering:* Over recent years, FINMA has enhanced its enforcement of due diligence rules under the Anti-Money Laundering-Act 1997,[16] in particular against banks and individual managers of banks.
- *Market abuse:* Over the whole period, the enforcement of market manipulation and insider trading rules were a priority of FINMA's enforcement against supervised firms and their staff but also, based on extended powers since May 2013, against other market participants.
- *Other:* This category covers other enforcement topics not captured in the categories described above, for example, rulings regarding appeals against takeovers decisions by the Swiss Takeover Board, for which FINMA is an appellate body, or information disclosure requirements. In addition, cases for which summaries did not provide enough information to identify a regulatory topic were included in this category.

When considering the entire period 2009–2017, the lion's share of FINMA's enforcement cases were related to the fight against the exercise of regulated activities without the required authorization *(unauthorized activity)*. Other frequent targets of enforcement activity include areas such as p*rudential rules, controls/ organization/risk, bankruptcy, anti-money laundering* and *market abuse*. These top-six categories account for more than 80% of enforcement rulings. Table 1 provides a quantitative overview of the different topics that have been the object of the 380[17] enforcement cases covered in the database.

Table 1: Enforcement cases by topic

Topic	2009–13	2014–17	Total 2009–17
Unauthorized activity	43%	35%	39%
Prudential rules	10%	14%	12%
Controls/ organization/risk	12%	10%	11%
Bankruptcy	2%	15%	8%
Anti-money laundering	9%	7%	8%
Market abuse	3%	10%	6%
Other/Unknown	21%	9%	16%
Total	194	186	380

IV. Appeals against FINMA's enforcement rulings

To what extent have these enforcement rulings been challenged in court? To address this question, we investigated the appeal rate on enforcement cases. On the basis of the information captured in the case summaries, Table 2 indicates the proportion of FINMA's enforcement cases that have been the object of an appeal before the Federal Administrative Court.

12 BA 1934, SR 952.0.
13 ISA 2004, SR 961.01
14 FMIA 2015, SR 958.1.
15 CISA 2006, SR 951.31.
16 AMLA 1997, SR 955.0.

17 Due to the brevity of some case summaries, coders were unable to identify the topic for 21 enforcement rulings. They consequently have been coded under the 'Other' category.

Table 2: Appeal rate in FINMA enforcement cases

	2009–13	2014–17	Total
Number of enforcement cases	194	186	380
Share of appealed cases	36%	42%	39%

Around 40% of the 380 enforcement cases appear to have been challenged in court. Comparing the two datasets retained, there seems a slight increase in the appeal rate against FINMA's decisions across time. Differences between periods should be interpreted with care and analysed in more detail. In particular, there could be several reasons for the increase in the appeal rate over time: a more frequent use of new enforcement instruments, such as industry bans and disgorgement of profits by FINMA, or a greater appetite for legal risk on FINMA's part triggering the increased resistance of the targets. The role of legal advisors and the real or perceived increase of the rate of successful appeals, as discussed later in section 5, would also need to be examined.

Table 3 looks closer at the frequency of appeals across regulatory topics. Over the total period 2009–2017, the rulings regarding *unauthorized activity* have been the least accepted. This finding should not surprise, given the often existential interests at stake. Enforcement related to *prudential rules, controls/organization/risk* and *market abuse* also shows a relatively high appeal rate. At the other extreme, the appeal rate in cases related to *bankruptcy* appears remarkably low, which may be due to the lack of funds available to cover the legal cost.[18]

Table 3: Appeal rate in FINMA enforcement cases by topic

Topic	Enforcement cases 2009–17	Share of appeals
Unauthorized activity	149	48%
Prudential rules	45	42%
Controls/Organization/Risk	41	39%
Bankruptcy	32	6%
Anti-Money Laundering	31	29%
Market abuse	23	44%
Other/Unknown	59	36%
Total	380	39%

V. Court decisions regarding FINMA's enforcement

To assess FINMA's court record, we now turn to data from court decisions. Figure 2 gives an overview of the number of court decisions from the Federal Administrative Court resulting from appeals filed against FINMA's enforcement rulings.

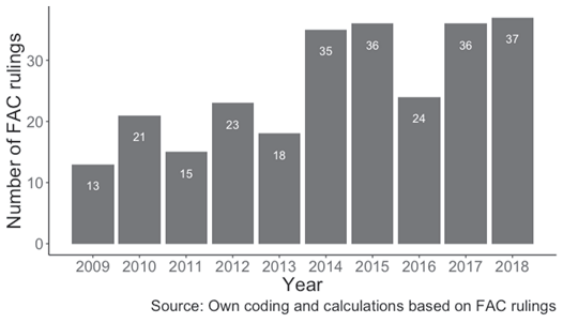

Figure 2: Federal Administrative Court rulings related to FINMA enforcement

For the period 2009–2018, we have identified a total of 257 FAC decisions on appeals filed against FINMA's

[18] The former directors of a legal entity replaced by FINMA in a bankruptcy or liquidation ruling are still entitled to file an appeal for the entity (FAC B-4312/2008, 31 July 2009, E. 1.6.1). However, FINMA has to release funds to allow an appeal. Such a decision requires the availability of funds in the first place. Moreover, the decision should take into consideration whether the appeal has at least minimal chances to succeed and needs to be weighted against creditors' interest (FAC B-7095/2013, 6 August 2014, cons. 2.2.1).

enforcement rulings.[19] Note that these figures, in contrast to the previous section on FINMA's enforcement rulings, do include cases on international administrative assistance. This is relevant given that in terms of topics, more than half of the FAC rulings identified concerned appeals against decisions in two areas:

– *International cooperation* cases (29%), mostly concerning bank customers opposing FINMA's decision to transfer information to foreign financial regulators.[20] This high number of appeals does not surprise us, given that FINMA issues formal rulings only when the customers do not agree with the transfer in the first place.
– *Unauthorized activity* (25%), which is also not surprising for the reasons already described.

The next frequent topic in terms of content of court decisions is *procedural issues* (16%), including suspension of proceedings,[21] the right to appeal either in principle[22] or consideration of the ongoing interest to appeal *(aktuelles Rechtsschutzinteresse)*[23] or jurisdiction of the court.[24] This topic is missing in the list of FINMA's enforcement topic as it is normally only raised or only treated at the level of the courts.

Table 3: Topics of Federal Administrative Court rulings

Topic	Total	%
International cooperation	74	29
Unauthorized activity	63	25
Procedural	42	16
Prudential rules	19	7
Controls/organization/risk	10	4
Anti-money laundering	9	4
Other	40	15
Total	257	100

Turning to the Federal Supreme Court (FSC), we identified 81 court rulings related to FINMA enforcement. In six of these 81 cases (7%), FINMA was the appellant reacting to an unfavourable FAC ruling. Figure 3 provides an overview of the number of court rulings across time.

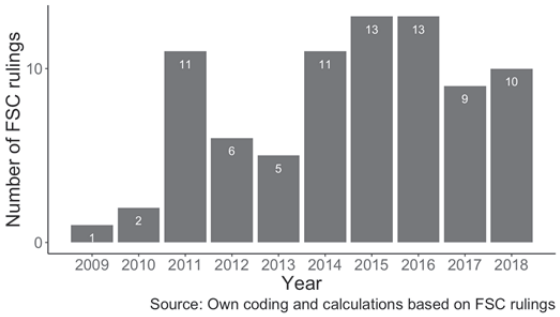

Figure 3: Federal Supreme Court rulings related to FINMA enforcementto FINMA enforcement

VI. FINMA's court record

What was the outcome of all these rulings? How often did courts overturn FINMA's enforcement decisions? Following an individual examination of each of the court decisions identified, we determined

19 Our database covers FAC rulings that have been published and made available in the Court website. We excluded from the database FAC rulings that were not related to enforcement, such as employment law measures against FINMA staff and (most) decisions of the FAC on costs as a follow-up of FSC decisions against FINMA. Court rulings related to decisions made before 2009 by FINMA's preceding authorities (i.e., Swiss Federal Banking Commission, Federal Office of Private Insurance and Anti-Money Laundering Control Authority) were also excluded. Note that in our database we have identified some court rulings that the FAC has treated in parallel. Nevertheless, in this paper we have decided not to aggregate them in order to keep reporting consistent when it comes to the unit of observation (i.e., court ruling). These include, for instance, the following three set of cases: 1) FAC B-626/2016, FAC B-635/2016, FAC B-642/2016, FAC B-685/2016, FAC B-686/2016 and FAC B-688/2016 of 11 June 2018, where the topic was "Market abuse" and the outcome was against FINMA (i.e., rulings against UBS FX dealers), 2) FAC B-3495/2018 and FAC B-3496/2018 of 28 September 2018, with the topic "International cooperation" and outcome against FINMA; and 3) FAC B-992/2018, FAC B-994/2018, FAC B-997/2018 of 13 December 2018, with topic "Bankruptcy" and outcome in favour of FINMA.

20 Under Art. 42 and 42*a* Financial Markets Supervision Act 2007 (FINMASA 2007), SR 956.1, *<https://www.admin.ch/opc/en/classified-compilation/20052624/index.html>*. Switzerland is one of the few countries with such formalized appeal proceedings in international cooperation between financial supervisory authorities, see *Urs Zulauf,* Kooperation oder Obstruktion? 20 Jahre Amtshilfe im Finanzmarktrecht vom Börsengesetz zum FINFRAG, Ges KR 3/2015, 336 (343 s.).

21 E.g. FAC A-628/2018, 12 June 2018.

22 E.g. FAC B-1092/2009, 30 April 2009.

23 E.g. FAC B-1290/2017, 22 September 2017.

24 E.g. FAC B-19/2012, 10 January 2012.

whether FINMA or its counterparty could be considered to have been successful in court. An in-depth assessment of each court ruling is necessary given that, beyond the complete acceptance or refusal of appeals by the courts, partially accepted appeals require closer inspection. The same applies to cases where the courts accepted appeals only as far as they entered into substance. In all these cases we assessed whether the appellants against FINMA's rulings achieved their main goal. If this turned out to be the case, we concluded that the courts decided "against FINMA". If the appellants did not achieve their main goal, we assessed the decision to be "in favour of FINMA". In an analogous way we assessed the appeals FINMA filed to the FSC against decisions of the FAC against FINMA. In cases where it was possible, we corroborated this assessment by the courts' cost-sharing decisions if and where the courts applied similar criteria.

Table 4 shows the results of our empirical assessment of FINMA's success before both the FAC and the FSC. Considering the entire period 2009–2017, courts have supported FINMA's enforcement decisions most of the time, as Table 4 indicates.

Table 4: Outcome of court rulings related to FINMA enforcement

	FAC	**FSC**
Number of court rulings	257	81
Rulings in favour of FINMA	83%	88%

Figures 4 and 5 show the number of rulings in favour of and against FINMA by year.[25] Annual fluctuations in FINMA's success rate by year should be interpreted with caution, given the relatively low absolute values involved. In general, the success rate of FINMA can be considered relatively stable throughout the entire period with, however, a low end at the FAC in 2018.[26]

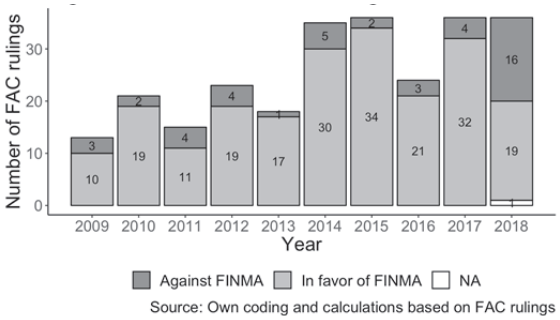

Figure 4: FINMA's record at the Federal Administrative Court

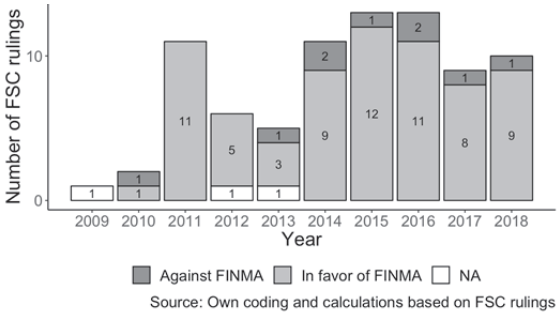

Figure 5: FINMA's record at the Federal Supreme Court

Before assessing FINMA's court record in more detail, we turn to some important areas where the courts supported or restrained FINMA's enforcement policy.

VII. Examples of courts supporting FINMA

We have selected three areas where the support of the courts has been of particular importance for FINMA's enforcement process.

1. Transfer of UBS client data to the US Department of Justice

In a ruling of 18 February 2009, FINMA ordered UBS to surrender a limited quantity of client data and handed it over to the US Department of Justice.[27] This

[25] For a limited number of cases, it was not possible to determine whether the outcome was in favour or against FINMA. For this reason, they appear as NA (Not Available) in Figures 4 and 5.

[26] Note that the success rate of FINMA for 2018 would appear substantially higher if the six parallel market abuse rulings would be counted as a single case, see footnote 19. The first FAC decision of the year 2019 was against FINMA as well, B-488/2018, 17 January 2019, where the FAC considered a two years industry ban against a General Counsel and Head Compliance as disproportionate under the circumstances, see section VIII.3 below.

[27] See FINMA, Media Release, 18 February 2009, *<https://www.finma.ch/en/news/2009/02/mm-ubs-xborder-20090218/>*.

ruling, issued by FINMA six weeks after its creation in the midst of the Global Financial Crisis 2007–2008, remains the most controversial of all the decisions it has ever taken.[28] The data concerned 255 accounts of US clients who had specifically set up or in other ways abused off-shore structures to circumvent reporting duties under US tax law, as amended in 2001 by the 'Qualified Intermediary Agreement'. These steps were in some instances actively supported or known about by UBS client advisors. FINMA took this extraordinary decision against the backdrop of intelligence from various sources that, without such a transfer of client information to the US, DoJ was going to criminally indict UBS. In FINMA's assessment at the time, such an indictment would have seriously endangered UBS's existence, the interests of UBS's creditors and the stability of the Swiss financial system. Prior to its ruling, FINMA had repeatedly informed the Federal Council about the situation. The Federal Council, "in the interest of the Swiss and the global financial system", asked FINMA's predecessor authority the Swiss Federal Banking Commission in December 2008 "to take all the measures necessary to avoid" unilateral measures of constraint by the US authorities against UBS.[29]

The Federal Council had given its support knowing that FINMA was going to base its ruling on provisions of the Banking Act that allow FINMA to take "protective measures" if it has "justified concerns" of "serious liquidity problems" of a bank[30]. FINMA argued in its decision that the data transfer was, at the time and given the circumstances, the only possible measure to avoid a liquidity problem for UBS. The courts did not support this reasoning, considering that FINMA used the insolvency provisions out of intended purpose and that such a use was unforeseeable for the account holders affected by FINMA's decision. Thus, the FAC first admitted their capacity to file an appeal denied by FINMA[31] and, in a second decision, ruled against FINMA on substance as well.[32]

On appeal by FINMA, this FAC decision was, in effect, overturned by the FSC in a majority vote of three to two judges.[33] The FSC concluded that, based on the explicit support given to FINMA by the Federal Council, FINMA's decision was covered by the Federal Council's capacity to take extraordinary measures to protect the public order and fundamental interests of the state and of private persons from heavy and immediate threats ('General Police Clause' based on section 36 of the Swiss Constitution). The FSC explicitly shared all elements of FINMA's risk assessment at the time of the ruling[34] and also considered that at least some of the UBS clients may have committed tax fraud justifying an exchange of bank-data, also under the framework of the US-Swiss double taxation treaty.[35]

The FSC's decision has caused intense controversy among scholars of constitutional law, which lies outside the scope of this paper.[36] However, this landmark decision was, in substance and with regard to possible consequences in case of another outcome, probably the most important support FINMA has received from the FSC. At the same time, it was one of the many other court rulings triggered by the 'US-Swiss tax dispute' regarding undeclared assets of US persons in Swiss banks and the role of these banks and bankers, covering topics such as international administrative assistance in tax matters, data-protection and labour law.

28 See the detailed report of the Swiss Parliament's Control Committees (SPCC), 30 May 2010, BBl 2010 3099, *<https://www.finma.ch/en/news/2009/02/mm-ubs-xborder-20090218/>*. The Parliament intensively discussed this report and 13 related parliamentary interventions in June 2010, when it eventually dismissed a motion to set-up a Special Parliamentary Investigation Commission to further investigate the matter, *<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20100054>*. For a detailed history of the UBS case see also: *Stefan Tobler,* Kampf um das Schweizer Bankgeheimnis. Eine 100-jährige Geschichte von Kritik und Verteidigung, Zurich 2019.

29 SPCC report (FN 28), p. 3322, translation by authors.

30 Art. 25 and 26 Banking Act 1934.

31 FAC, B-1092/2009, BVGE 2009/31, 30 April 2009.

32 FAC, B-1092/2009, 5 January 2010.

33 FSC, BGE 137 II 431, 15 July 2011.

34 Idem, cons. 4.2 and 4.3.

35 Idem, cons. 4.4. This assessment was confirmed by the FAC in a decision taken three weeks after FINMA's ruling, A-7342/2008 and A-7426/2008, 5 March 2009.

36 E.g. (with however different perspectives) *Giovanni Biaggini,* Die polizeiliche Generalklausel: ein verkanntes Rechtsinstitut, Bemerkungen aus Anlass des Urteils des Bundesgerichts vom 15. Juli 2011 in Sachen FINMA/UBS (2C_127/2010), ZBl 113/2012, p. 35–45; *Axel Tschentscher,* case review in: ZBJV, Die staatsrechtliche Rechtsprechung des Bundesgerichts in den Jahren 2011 und 2012, 673–679; *Marcel Alexander Niggli,* Ist das Recht am Ende?, AJP 2012, 891–893.

2. Practical terms for international cooperation

Based on our database, the FAC ruled against FINMA in only 10 out of 74 (i.e. 14%) international cooperation cases decided from 2009 to 2018. Thus, the court supported FINMA's pro cooperation approach to a very large extent. In doing so, the FAC decided in favour of international cooperation by following FINMA's interpretation of various undefined legal terms, and set up practical parameters for FINMA's international cooperation in particular regarding market abuse cases. As discussed in another paper,[37] the FAC (and before 2008 the FSC) would have had the discretion to decide otherwise and substantially limit the scope of international cooperation. The courts thus followed FINMA's approach to a considerable extent, but not blindly, as will be discussed in the next section.

This fundamental policy decision of the courts is well reflected in a recent decision regarding international cooperation in favour of the US Securities and Exchange Commission (SEC).[38] The SEC requested information on bank accounts from two companies receiving funds from a trading platform distributing securities without the required license and fraudulently to investors in the US. The FAC repeated in this decision some key elements of its jurisprudence regarding FINMA's international cooperation, e.g. that:

- Only holders of bank accounts (i.e. contracting partners), but not beneficial owners (when they are not account holders) of the funds on that account, are a party to FINMA's proceedings and entitled to appeal against FINMA's ruling on international cooperation (cons. 2);
- It is not the duty of FINMA, but of the requesting authority, to examine and to interpret the law applicable to the requesting authority (cons. 4.2);
- FINMA is supposed and allowed to fundamentally trust the requesting authority and, in absence of manifest signals for abuse of rights or violation of international public order, must not second-guess the description of the facts by the requesting authority, nor doubt the requesting authority's confirmation regarding the use of the information (cons. 4.3 and 4.4);
- The requesting authority only has to present a plausible initial suspicion for a violation of law and FINMA may not place too high a demand in that respect. Rather, it is sufficient if the requested information appears suitable in principle to support the foreign supervisory procedure and if this is demonstrated conclusively and comprehensibly in the request. The requesting supervisory authority must in particular describe the facts that give rise to the initial suspicion, state the legal basis of the investigation and list the necessary information and documents. It is sufficient if, at this stage, there are only indicia of a possible violation of financial market regulations and the information requested is not without any connection to the suspected irregularities (cons. 5.2).

3. Non-applicability of criminal procedural standards

In various instances, scholars and defence lawyers have argued that FINMA's enforcement and sanctions such as industry bans, disgorgements of profit or the publication of a ruling should be considered as a ‹criminal charge› under Art. 6 of the European Convention on Human Rights (ECHR).[39] If this were the case, the courts would have to address whether:

37 *Zulauf* (FN 20), 340 s.

38 FAC B-37010/2018, 4 October 2018.

39 In this sense, *Peter Ch. Hsu/Rashid Bahar/Daniel Flühmann,* in: Watter/Bahar (Hrsg.), Basler Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz, 3. Aufl., Basel 2018, N. 10*d* zu Art. 33 FINMAG; *Louis Frédéric Muskens,* La fausse bonne idée des sanctions administratives, ContraLegem 2018/2, 55 ss.; (with different arguments but the same result in substance) *Marcel Alexander Niggli,* Kann der Begriff der strafrechtlichen Anklage (Art. 6 EMRK) definieren, was Strafrecht ist (am Beispiel BGE 142 II 243 zum FINMAG-Berufsverbot)?, ContraLegem 2018/2, 49 ss.; *Damian Graf,* Strafrechtlicher Umgang mit Verfehlungen in der Finanzbranche, GesKR 2018, 43 (46); *ders.,* Berufsverbote für Gesellschaftsorgane: das Sanktionsregime im Straf- und Finanzmarktrecht, AJP 2014, 1195–1206, 1201 f.; neueren Datums auch *Melanie Gottini/Hans Caspar von der Crone,* Berufsverbot nach Art. 33 FINMAG, Bundesgerichtsurteil 2C_739/2015 vom 25. April 2016, Urteilsanmerkung, RSDA 2016, 640 (646 ss.); *Marcel Alexander Niggli/Stefan Maeder,* Das Enforcementverfahren der Finanzmarktaufsicht (FINMA), Jusletter 7. März 2016, note 46 ss.; *Guillaume Braidi,* L'individu en droit de la surveillance financière, Autorisation, obligations et interdiction d'exercer, Diss Fribourg, Zürich 2016,

- FINMA's enforcement proceedings and the subsequent court proceedings would satisfy ECHR's fair trial requirement as a whole or whether a public and contradictory first instance court proceeding would need to be introduced. This would replace the current non-public (neither to the parties nor the general public) administrative enforcement proceeding;
- The duty of all firms supervised by FINMA (including those with unauthorized activity and managers of supervised firms) to cooperate with FINMA and to disclose information to FINMA would contradict ECHR's prohibition of self-incrimination in criminal proceedings *(nemo tenetur);*
- FINMA's discretion to assess a lack of cooperation as evidence against a party subject to this duty to cooperate would violate the presumption of innocence as provided by Art. 6(2) ECHR.

The courts did not follow these arguments. In April 2015, the FSC confirmed FAC's previous jurisprudence in a landmark case arguing that:

> *"[…] irrespective of the repressive elements which the industry ban of Art. 33 FINMASA also contains […], this sanction must be classified as administrative and not as criminal under national law […]. By its very nature, it is not addressed to the general public, but to persons with management functions in supervised entities and thus to a specific profession, which is to be encouraged by the threat of sanctions to exercise its profession correctly in compliance with supervisory law […]. It should not be denied that even a temporary industry ban may have a sensitive impact on the free choice of profession of the affected persons. However, this limitation of the possibilities to choose a profession first and foremost qualifies, with regard to its nature and severity, as a "police-law" motivated and temporally limited restriction of the constitutionally guaranteed economic freedom […] and not as a retaliation for a committed wrongdoing […]. […] As the industry ban procedure does not qualify as a criminal charge within the meaning of Art. 6 (1) ECHR […], the guarantees derived from these provisions […] shall not apply."*[40]

Subsequent case law of the FAC[41/42] confirmed this decision, although in substance the FAC requirements regarding FINMA's standards of proof and reasoning in industry ban rulings come close to those for criminal proceedings.

VIII. Examples of courts restricting FINMA

Even though the courts supported FINMA's enforcement rulings to a large extent, at the same time they carefully controlled and even restricted FINMA's enforcement powers in various ways and over some important areas. We have selected three examples: unauthorized activities, international cooperation and industry bans.

note 1151 ss.; *ders.,* L'individu face à la surveillance financière suisse: état des lieux et discussion sur un assujettissement direct, RSDA 2016, 182 (192); *ders.,* L'interdiction d'exercer selon l'art. 33 LFINMA: étendue, délimitations et qualification, RSDA 2013, 204; *Carlo Lombardini,* La protection de l'investisseur sur le marché financier, Diss. Lausanne, Geneva 2012, 314 ss. *Jacques Iffland,* Les procédures d'enforcement de la FINMA, ou de la difficulté de coordonner les procédures coercitives administratives et les procédures pénales sous l'empire du nouveau CPP et de la LFINMA, in: Thévenoz/Bovet (eds.), Journée 2010 de droit bancaire et financier, Geneva 2011, 121 (134 ss.); *Alain Macaluso,* Vers un véritable droit pénal suisse des affaires: La nécessité d'une approche centrée sur l'entreprise, RSDA 2008, 248 ss.; *Wolfgang Wohlers,* Reformbedarf bei der Börsenaufsicht, in: Wohlers (Hrsg.), Neuere Entwicklungen im schweizerischen und internationalen Wirtschaftsstrafrecht, Zurich 2007, 41 ss. Different view *Urs Zulauf et al.,* Finanzmarktenforcement, Verfahren zur Durchsetzung des Schweizer Finanzmarktrechts, 2nd ed., Berne 2014, 254 s.; *Christoph Kuhn,* Das Berufsverbot nach Art. 33 FINMAG, LLM Thesis, Zurich 2014, 44 s.; *Karl Weber,* Informationsmissbrauch im Finanzmarkt, Eine Untersuchung des börsenrechtlichen Systems zur Ahndung und Abwehr von Informationsmissbrauch im schweizerischen Finanzmarkt, Diss. Luzern, Zurich/Basle/Geneva 2013, 245 f.; *Felix Uhlmann,* Berufsverbot nach Art. 33 FINMAG, RSDA 2011, 437 (442).

[40] FSC 142 II 243, 2C_739/2015, 25 April 2015, cons. 3.2–3.4.

[41] FAC B-3092/2016, 25 April 2018, BVGE 2018 IV/4, cons. 2.2–2.3. B-626/635/642/686/688/2016; 11 June 2018, cons. 4.2.

[42] The six parallel decisions of 11 June 2018 with regard to former UBS FX dealers B-626/635/642/686/688/2016; and most recently the decision with regard to the former General Counsel of Falcon Private Bank of 17 January 2019, B-488/2018 all decided against FINMA.

1. Tighter framework for enforcement against unauthorized activities

As discussed above, the enforcement of the financial markets law against firms, their directors and shareholders for carrying out activities requiring a license without being authorized or able to fulfil the authorization criteria represents a substantial part of FINMA's enforcement resources. At the same time, the appeal rate against FINMA's rulings under this topic is relatively high.

Here as well, the courts are backing FINMA's enforcement results to a large extent. Only in nine of 63 (14%) of such cases has the FAC ruled against FINMA. None of the 16 appeals to the FSC against the 54 FAC-decisions in favour of FINMA were successful.

Nevertheless, in the nine rulings against FINMA the FAC has considerably increased the bar for FINMA's enforcement against unauthorized companies. This includes, for instance:

- Asking FINMA to increase the substance of the reasoning in its rulings in order to safeguard the parties' right to be heard;[43]
- Overturning FINMA's decision not to accept an involved person as a party; [44]
- Assessing, and eventually rejecting, the proportionality of liquidation measures ordered by FINMA; [45]
- Extensively examining repayment obligation clauses of investments and eventually denying that they qualify as deposits under the Banking Act 1934; [46]
- Concluding that the purchase by a parent company of shares issued by a subsidiary with operational activity as an IT-start-up and the subsequent sale of these shares to investors does not qualify as an issuing activity under SESTA; or[47]
- Disagreeing with FINMA's assessment of the contributions of the individual directors to the wrongdoing of a firm with unauthorized activity,[48] even though they may not have entirely complied with their control obligations as board members.[49]

Given the importance and size of FINMA's enforcement against unauthorized activities, these guiding principles will have a considerable impact on FINMA's enforcement policy as a whole.

2. Standards for FINMA's international cooperation

As discussed, only one of seven appeals against FINMA's rulings on international cooperation was successful in the 2009–2018 period. Nonetheless, some of the 10 FAC decisions against FINMA are likely to have a considerable impact on FINMA's practices regarding international cooperation. Thus, based on FAC case law, FINMA has to:

- Refuse the transfer of information if FINMA becomes aware of the leaking of the exchange between FINMA and a requesting authority (in this case the Securities and Exchange Commission Pakistan)[50] or in the presence of fundamental dysfunctions in the requesting authority's internal processes endangering the safeguard of confidentiality by the requesting authority (in these cases the *Autorité des Marchés Financiers Québec)*[51];
- Examine and be satisfied by a plausible initial suspicion of the requesting authority. This is missing, for example, when the Swiss bank's client whose account transaction data are requested has not initiated a transaction susceptible to be part of a scalping market abuse but has only made a payment to the initiator one year before the suspicious transaction (case regarding the German BAFIN);[52] or
- Examine, to a certain extent, the powers of the requesting authorities under foreign law and to deny the cooperation when it is established, e.g. by a decision of a foreign court, that the author-

43 FAC, B-3694/2010, 6 April 2011.
44 FAC, B-3987/2011, 12 July 2011.
45 FAC, B-7095/2013, 6 August 2014.
46 FAC, B-4354/2016, 30 November 2017; B-4772/2017, 19 December 2017.
47 FAC, B-1561/2016, 21 March 2018.
48 FAC, B-1568/2017, 23 July 2018.
49 FAC, B-5688/2016, 6 November 2018.
50 FAC, B-5961/2013, 27 May 2014. FINMA had already reconsidered its decision and the FAC had to rule only on the cost and the (redacted) publication of this decision to delete the case from its docket.
51 FAC, B-3496/2018 and B-3496/2018, 28 September 2018.
52 FAC, B-7550/2014, 30 April 2015.

ity lacks jurisdiction in a particular case (case regarding the French Autorité des Marchés Financiers).[53]

3. Limits to industry bans and demand for deeper reasoning in FINMA rulings

The Financial Markets Supervision Act 2007 (FINMASA) has given FINMA the explicit power to prohibit individuals responsible for *"a serious violation of supervisory law"* from acting in a *"management capacity at any person or entity subject to its supervision"* for a period of maximum five years ("industry ban").[54] The new power includes a repressive sanction purpose and complements the 'Fit and Proper Requirement' already existing in the financial markets laws which was, and still is, different in scope and has only a preventive purpose.[55]

Initially, FINMA applied restraint in the use of this new instrument against individual wrongdoers, in any case as long as they had left their job. However, in autumn 2014, FINMA announced as part of a revised enforcement strategy that, in line with general global enforcement trends, it would more aggressively apply industry bans against individuals in order to have a positive impact on the supervised firms' overall compliance.[56] FINMA delivered on this announced change in strategy as FINMA's enforcement data indicate, showing on average more than 15 individuals working in supervised entities affected by FINMA enforcement proceedings in the 2014–17 period.[57]

Industry bans critically affect professional careers, of which FINMA is perfectly aware: *"Our message is: if you try, you will be caught; and if you are caught, your career will not be the same afterwards."*[58] Given the interests at stake, and the financial means of many of the affected individuals to cover the risks of legal costs, it is not surprising that a considerable number among them filed appeals against FINMA industry bans.

While the FAC ruled often in favour of FINMA, this was not the case with the landmark FSC decision of April 2015[59] regarding the former CEO of the (now-defunct) Bank Frey for alleged irresponsible risk-taking in the bank's cross-border business with US-clients and the follow-up decision by the FAC of April 2018.[60] In summary, these and subsequent decisions by the FAC[61] have considerably raised the standards the courts are expecting from FINMA in terms of evidence and reasoning. In summary, the courts expect FINMA to:

- Carefully establish and examine the facts and all legal elements of wrongdoing, as well as the arguments of the targeted individuals;
- Specify the provisions of supervisory law, and the specific duties derived from them, requiring the individual person to take specific actions and to show the extent to which the individual has failed to act accordingly.[62] In particular, the courts demand high standards with regard to the clarity and certainty of the provisions infringed in the specific case and of the specific duties resulting from these provisions for the supervised persons, so that the industry ban is foreseeable for the persons potentially affected; [63]
- Assess all elements, including those in favour of the individual person (such as specific or shared responsibilities, cooperation in the proceedings, likelihood and potential of future infringements) and give specific reasons why an industry ban is proportionate for the envisaged duration.[64]

53 FAC, B-741/2016, 13 May 2016.

54 Art. 33 FINMASA.

55 For more details, see *Urs Zulauf,* Die Gewähr vor Gericht – Die von den Schweizer Finanzmarktgesetzen geforderte "Gewähr für eine einwandfreie Geschäftstätigkeit" und das "Berufsverbot" im Lichte der jüngeren Rechtsprechung, FINMA-Bulletin 2/2013, 17 ss.

56 *Mark Branson,* Enforcement, Speech at the Journée de droit bancaire et financier, Geneva, 30 October 2014; FINMA Enforcement policy (updated 29 September 2014): *<https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/rede-bnm-20141030-e.pdf?la=en>*.

57 See e.g. FINMA Enforcement-Report 2017, 36.

58 *Branson* (FN 56).

59 FSC 142 II 243, 2C_739/2015, 25 April 2015.

60 FAC B-3092/2016, 25 April 2018, BVGE 2018 IV/4 .

61 See the 6 parallel decisions of 11 June 2018 with regard to former UBS FX dealers, B-626/635/642/686/688/2016; and most recently the decision with regard to the former General Counsel of Falcon Private Bank of 17 January 2019, B-488/2018 all decided against FINMA.

62 FSC 142 II 243, 2C_739/2015, 25 April 2015, cons. 2 und 3.1.

63 FAC B-3092/2016, 25 April 2018, BVGE 2018 IV/4, cons. 3.4.3.

64 FAC B-488/2018, 19 January 2019.

It is not only for industry bans that the courts have raised the standard of justification for FINMA, requiring a fuller reasoning in its enforcement decisions.[65] It will be challenging for FINMA to reach these standards. The standards of proof for industry bans is now close to those applicable in criminal proceedings, even though the presumption of innocence does not apply in FINMA's enforcement proceedings, as recently confirmed by the FSC.[66]

IX. Judicial review of due process in FINMA's enforcement proceedings

FINMA's compliance with due process requirements is frequently raised in appeals before the FAC. It includes the complaint that FINMA has violated constitutional rights such as the *guarantee of judicial review (Art. 29a Const.), right to be heard including the right that the authority establishes the facts correctly and comprehensively, right of access to justice and timely justice, right of access to file, right to an equal and fair treatment by courts and administration including the right to have unbiased persons treating the case.*

According to our empirical assessment, in the 2009–2018 period the issue of the due process of FINMA's enforcement procedure was discussed in around 44% of 257 court rulings. The FAC supported FINMA's practice in a vast majority of these cases. Only in 14% of cases where due process was discussed did the FAC rule against FINMA because of a due process failure.

Table 5: Due process failure as reason of FAC-decision against FINMA

Total FAC decisions	Due process discussed	Due process discussed (%)	Due process failure accepted	Due process failure accepted (%)
257	114	44	16	14

X. Judicial review of FINMA's discretion in enforcement proceedings

Lawyers and other professionals involved in FINMA's enforcement proceeding sometimes raise the concern that the courts only apply limited scrutiny to FINMA's enforcement rulings. According to this view, courts would hesitate to examine and, if necessary, overrule FINMA's "technical discretion" and the "margin of interpretation" of undefined legal terms. We often find references to FINMA's technical discretion in FAC decisions, such as:

> *The term "serious violation of supervisory provisions" in Art. 33 para. 1 FINMASA is an undefined legal term whose interpretation and application are to be examined as a legal question without judicial restraint. According to constant practice and doctrine, however, restraint must be exercised and the law-enforcing authority be granted a certain margin of discretion if it is closer to the local, technical or personal circumstances or has specific specialist knowledge. The court does not have to intervene as long as the interpretation of the administrative authority appears to be justifiable. FINMA must therefore be given a certain degree of technical discretion when deciding whether the violation of supervisory provisions is serious (cf. in particular BVGE 2013/59 E. 9.3.6).*[67]

Indeed, FINMA's discretion is mentioned in some way or another in no fewer than 74 (29%) of the 257 FAC decisions in the period from 2009 to 2018.

However, FINMA's success rate in this selection of cases is, with 55 cases (74%), not – as one might expect – higher than FINMA's general success rate. Rather, it is smaller. This ratio, as well as the review of the cases, suggest the courts do not shy away from scrutinizing and second-guessing the substance of FINMA's decisions, even when referring to FINMA's discretion. Probably the most prominent case where the FAC overturned FINMA's discretion was the UBS client data case.[68]

65 See e.g. B-3694/2010, 6 April 2011, topic: unauthorized activity; B-3450/2018, 24 August 2018, topic: international cooperation.

66 See above section VII.3.

67 FAC, B-488/2018, 17 January 2019, cons. 4.3. Translation by authors.

68 FAC, B-1092/2009, 5 January 2010, cons. 6.4.3; for the context see above section VII.1.

XI. High or low? First conclusions on FINMA's court record

We close with some general conclusions on FINMA's overall success rate in Court. *Prima facie,* the FINMA's success rate seems high at both the FAC (83%) and the FSC (88%). Nevertheless, it is difficult to assess these numbers without comparative data. For instance, it would be ideal to compare FINMA's success rate before Swiss courts versus that of other federal supervisory agencies or to examine how foreign financial supervisors perform in other jurisdictions.

Even if this kind of comparative data were available, it would remain challenging to assess the policy implications of the supervisory authority's success rate in court. How should the court success rate of the supervisory authority be evaluated from a public policy perspective? On the one hand, a considerably higher success rate could mean that FINMA is not effectively enforcing the supervisory law or that the courts are not seriously scrutinizing FINMA's rulings. On the other hand, if the success rate was considerably lower, one could conclude that FINMA is enforcing too aggressively, taking too much legal risk, not carefully conducting the proceedings or that the courts systematically undermine FINMA's enforcement work.

Overall, this first quantitative and qualitative analysis of the courts' scrutiny of FINMA's enforcement activity suggests that the courts exercise an effective judicial control, despite the high number of FINMA's rulings confirmed by the courts. Apart from a few outliers regarding undesirable delays in the court proceedings, which we cannot further develop here, we have not come across major dysfunctions in the judicial review process. Individuals and entities not succeeding in the courts with their appeals against FINMA's enforcement rulings may have a different perception, but from a public policy perspective we conclude that those who seek justice with regard to FINMA's enforcement seem to effectively get justice from the Swiss courts. While the courts may not *"write on a wholly clean slate"* when it comes to FINMA's enforcement policy, they do leave clear marks on it.

XII. Appendix

Table A1: Legal and judicial terms

English	**Deutsch**	**Français**
Access to file	Akteneinsicht	Accès au dossier
Appeal	Beschwerde	Recours
Excessive formalism	Übertriebener Formalismus	Formalisme excessif
Due process	Fairness im Verfahren	Garanties procédurales
Justice denied	Rechtsverweigerung	Déni de justice
Justice delayed	Rechtsverzögerung	Déni de justice formel
FINMA Investigations	Abklärungen	Investigations
FINMA proceedings	Enforcementverfahren	Procédures d'enforcement
Guarantee of judicial review	Rechtsweggarantie	Garantie de l'accès au juge
Federal Administrative Court (FAC)	Bundesverwaltungsgericht (BVGer)	Tribunal administratif fédéral (TAF)
Federal Supreme Court (FSC)	Bundesgericht (BGer)	Tribunal fédéral (TF)
FAC ruling	Entscheid Bundesverwaltungsgericht	Décision du Tribunal administratif fédéral
FSC ruling	Entscheid Bundesgericht	Décision du Tribunal fédéral
FINMA ruling	FINMA-Verfügung	Décision de la FINMA
Margin of interpretation	Beurteilungsspielraum	Latitude de jugement
Right to be heard	Rechtliches Gehör	Droit d'être entendu
Technical discretion	Technisches Ermessen	Pouvoir d'appréciation (au sens étroit)
Undefined legal term	Unbestimmter Rechtsbegriff	Notion juridique indéterminé

Table A2: Regulatory topics

English	**Deutsch**	**Français**
Bankruptcy and Resolution	Konkurs-, Sanierungs- und Schutzmasssnahmen	Liquidation et mise en faillite
Unauthorized activity	Unbewilligte Tätigkeit	Activités exercées sans droit
Controls, Organization, Risk	Kontrollen, Organisation und Risikomanagement	Contrôles internes, organisation et gestion du risque
Prudential rules	Prudentielle Aufsichtsregeln	Réglementation prudentielle
Anti-money laundering	Geldwäschereibekämpfung	Anti-blanchiment
Takeover	Übernahmen	Offres publiques d'acquisition
Disclosure	Offenlegung	Obligation de publicité
Market abuse	Marktmissbrauch	Abus de marché
Due process	Fairness im Verfahren (Rechtliches Gehör et al.)	Garanties procédurales
Procedural	Verfahrensfragen	Aspects procéduraux