

**The Swiss authorities under the pressure of the financial
crisis and the disclosure of UBS customer data to the USA**
Report of the Control Committees of the Federal Assembly

31 May 2010

Summary

Point of departure

In the last quarter of 2008 and in the first quarter of 2009, the Swiss Confederation had to take two measures in connection with UBS:

- 1. In mid-October 2008, as a consequence of the financial crisis, UBS had a serious liquidity problem, which was threatening the bank's existence. After a further private recapitalisation of the bank failed to materialise, the Federal Council and the Swiss National Bank (SNB) took concerted measures on 15 October 2008 in order to avert this danger and to stave off massive damage to the Swiss national economy and to financial stability. On that day, the Federal Council resolved to stabilise UBS by subscribing to an issue of mandatory convertible notes to the amount of 6 billion francs. At the same time, the SNB undertook to take over "toxic" securities valued at a maximum of 60 billion dollars from UBS.¹*
- 2. After months of negotiations between UBS and the American authorities, the Swiss Financial Market Supervisory Authority (FINMA) found itself constrained, on 18 February 2009, to order UBS to disclose customer data.² The efforts made by various Swiss authorities (particularly the Swiss Federal Banking Commission/FINMA and the Federal Department of Finance (FDF)), to reduce the steadily increasing pressure exerted by the American authorities in the context of the two mutual administrative assistance proceedings with the American stock market supervisory body (U.S. Securities and Exchange Commission- U.S. SEC) and the American tax authorities (Internal Revenue Services - IRS) from March 2008 onwards, had not been sufficient to prevent the disclosure of data.*

Such a massive financial intervention by the Confederation for the benefit of a private enterprise as is constituted by the first measure, is of extreme momentousness for Switzerland. However, the second measure also had far-reaching consequences for this country: in the wake of the disclosure of customer data in February 2009, Switzerland had to qualify the differentiation between tax fraud and tax evasion, to adopt Article 26 of the OECD Model Convention for double taxation treaties, and to concede extended mutual administrative assistance in the context of a revision of the double taxation treaty between Switzerland and the USA (DTT) in the summer of 2009.³

Inspection by the CCs

It was against this background that the Control Committees of the Federal Assembly (CCs) jointly conducted an extensive inspection between March 2009 and late May 2010 in order to examine the conduct of the Swiss authorities that had been involved in the run-up to the two measures in terms of its appropriateness and effectiveness. An assessment of the behaviour of UBS and the American authorities falls outside

¹ Chapter 2.5.3.2.

² Chapter 3.5.2.4.

³ Chapter 3.5.4.

the scope of parliamentary supervision, which means that the CCs were unable to subject it to scrutiny.⁴

The CCs held 26 meetings to conduct hearings with 59 members of the Federal Council, representatives of the FDF, the Federal Department of Foreign Affairs (FDFA), the Federal Department of Justice and Police (FDJP), the FBC/FINMA, the Federal Administrative Court, the SNB and UBS⁵, as well as other experts. For the assessment of the authorities' conduct before and during the financial crisis in an international comparison, the CCs had a study drawn up by external experts.⁶ Moreover, they reviewed an extensive range of documents and mandated their Control Delegation to consult the confidential documents of the Federal Chancellery about the negotiations within the Federal Council.⁷

The most important results of the CC Inspection are summarised below. However, this Summary is no substitute for a perusal of the Report as a whole since the Report contains extensive factual observations which serve to explain the grounds for the CCs' conclusions.

Investigation I: The Swiss authorities' conduct in connection with the financial crisis

1. From financial turbulences to a major economic and financial crisis

The financial crisis that caused big banks like UBS and Credit Suisse to find themselves in difficulties had its origins in the problems related to the American high-risk mortgage market, the so-called "subprime" mortgage market. In 2007, the turbulences were essentially financial in nature; then, after the bankruptcy of Lehman Brothers on 15 September 2008, the world economy was plunged into a financial and economic crisis of a huge scale.⁸

The American subprime mortgage market had already been in difficulties in 2006, when housing prices registered a severe slump. Unaware of UBS's engagement in this market, the FBC only made enquiries at UBS in March 2007. At that juncture, UBS's knowledge of its exposure was not only erroneous; rather, the bank even hoped to benefit from the collapse of the market. This is explained by the fact that the risk management system run by UBS did not include the exposures that turned out to be the most problematical because of the – a priori good – Triple A rating they had been awarded by the international agencies.⁹

The uncertainty regarding the extent of the losses and write-offs to be suffered by the big international banks in the subprime markets increased until it reached a level where the money markets sustained a great crisis of confidence. On 9 August 2007, this resulted in a complete dry-up of liquidity on the interbank markets, which signalled a warning of a profound dysfunction.

As from this moment, the SNB and the FBC became active and took a certain number of measures. In August 2007 the SNB, in coordination with other central banks, carried out massive liquidity injection operations in order to ensure that the

⁴ Chapters 1.2, 2.1.3 and 3.1.2.

⁵ Chapter 3.6.8.3.

⁶ Chapter 2.9.5.

⁷ Chapter 1.5.2.

⁸ Chapters 2.1.1, 2.3 and 2.4.

⁹ Chapter 2.3.

money and interbank markets would continue to function. The SNB also increased its monitoring activities of other markets affected by the turbulences. In parallel, the FBC, in cooperation with the SNB, started to keep a more watchful eye on the big banks. The FBC also revised its working methods and reorganised its Major Banks Department. In late August 2007, the FBC provisionally decided to raise capital requirements for UBS and Credit Suisse.¹⁰

In January 2008, the Head of the FDF was informed by the Presidents of the SNB and the FBC that UBS was facing very serious difficulties. The bank's situation was so alarming that it became necessary for a scenario of last resort to be drawn up, i.e. to prepare for a possible government intervention for the benefit of the bank. At that stage, the Federal Council was not informed about the seriousness of the situation by the Head of the FDF.¹¹

In March 2008, the FBC called for the resignation of Marcel Ospel as Chairman of the Board of UBS, which then took place on the occasion of the bank's annual general meeting on 23 April 2008.¹²

After a relatively quiet summer, the bankruptcy of Lehman Brothers on 15 September 2008 shook the international financial systems to its foundations and triggered a strong economic slump. The situation of UBS deteriorated to such an extent that aid provided by the SNB and the Confederation turned out to be indispensable for ensuring the stability of the financial system and the Swiss national economy.¹³

On 20 September 2008, the President of the SNB and the President of the FBC separately contacted the Head of the FDF to inform him that they considered the situation of UBS to be very serious indeed.¹⁴

On Sunday, 21 September 2008, the highest officers of the SNB, the FBC and the FDF, who were in charge of crisis management, were informed, on the one hand, that UBS required support from public authorities fast and, on the other hand, that the Head of the FDF had suffered a heart attack on the previous evening.¹⁵ The tasks now in hand were to ensure that the Head of the FDJP deputised for the Head of the FDF, and to finalise the support measures.

Thus it took only a few days for the difficulties besetting UBS to become so serious that the bank's survival was under threat and could only be ensured through the government intervention which the bank officially requested on 14 October 2008.

In its meeting of 15 October 2008, the Federal Council determined the measures to be taken to stabilise the system. The transfer of illiquid assets of UBS in a maximum amount of 60 billion dollars to a special-purpose vehicle by the SNB and a reinforcement of the capital base of UBS through the subscription to an issue of mandatory convertible notes to the value of 6 billion francs by the Swiss Confederation constituted the two principal measures.¹⁶

¹⁰ Chapter 2.5.1.

¹¹ Chapter 2.5.2.2.

¹² Chapter 2.5.2.6.

¹³ Chapter 2.5.3.

¹⁴ Chapter 2.6.3.

¹⁵ Chapter 2.6.3.

¹⁶ Chapter 2.5.3.2.

2. A crisis management organisation that does not involve the Federal Council

Ever since the late 1990s the SNB, the FBC and the Federal Finance Administration (FFA) had been considering coordination structures and steering mechanisms to be employed in a financial crisis; more recently, they had also been considering intervention options to be employed should a big Swiss bank go bankrupt.¹⁷ When the financial crisis manifested itself and the question of government support for UBS arose, the Swiss authorities therefore profited from a well-structured crisis management organisation, well-developed ideas about the crisis scenarios of a big bank, as well as a certain experience of cooperation. Conversely, these scenarios did not extend to a crisis of the financial system as a whole. Moreover, the crisis management organisation did not have operative plans, nor had a policy decision concerning a possible financial commitment of the Confederation for the rescue of a big bank been adopted.

The CCs take note of the fact that the Swiss authorities perceived the risks and took preparatory measures. The CCs do not doubt that the structures that had been set up provided a framework that was favourable to cooperation and to the definition of the package of measures for the stabilisation of the financial system although operative plans had not yet been drawn up.

Whereas the crisis management organisation defines the point in time at which the FDF assumes control – once the involvement of the Confederation enters the realm of the probable – the CCs take note of the fact that the crisis management organisation does not define a role or specific procedures with regard to the involvement of the Federal Council. However, the CCs consider it to be absolutely indispensable that the Federal Council should be included in such a structure. A financial and economic crisis can have serious consequences for society, the citizens and national security. The CCs therefore fail to understand why the Federal Council was not part of the crisis management structure and why, ultimately, its role was reduced to that of a “final decider” concerning the adoption of measures in the preparation of which it had not actually been involved. The CCs therefore regard it as absolutely necessary that the role and involvement of the Federal Council should be defined within the crisis management organisation as a whole (Recommendation 1).¹⁸

3. An inability to detect the crisis – a monitoring practice to be modified

The SNB and the FBC voiced their concerns regarding the growth of the big banks’ balance sheets, risk management and the problems caused by an insufficient capital base long before the crisis broke out. Other actors, most notably the Bank for International Settlements, issued more explicit warnings and underlined the dangers that were directly related to the American mortgage market.¹⁹

In view of the indicators and events, the CCs are of the opinion that the Swiss authorities failed to detect the crisis, just like the majority of authorities the world over. The issue of companies that are too big to fail had not really been considered yet or at least had not triggered a debate. This can partially be explained by the exceptional (profitable) results achieved by the big banks, which at the time hardly

¹⁷ Chapter 2.2.

¹⁸ Chapter 2.10.1.

¹⁹ Chapter 2.3.

gave occasion to cast doubt on their financial health and the quality of their strategic options.

The CCs are further of the opinion that the authorities were too easily satisfied by their initial findings. The inability to detect a crisis of such proportions also raises numerous questions regarding the appropriateness of the objectives and the instruments of financial market supervision.²⁰

Thus the FBC has pointed out repeatedly the importance of an efficient risk management in its annual reports as well as in the context of its international cooperation. It must however accept the reproach of having neglected to act upon this knowledge in its supervision, particularly in regards to UBS. The FBC omitted especially to thoroughly undertake corresponding clarifications and even to envisage requirements regarding legal and reputation risks; this in spite of the numerous questions that UBS' risk structure should have raised.

In the eyes of the CCs, the observation of this failure actually calls for substantial improvements since Switzerland is particularly sensitive to and dependent on the health of the country's two biggest banking establishments. The exceptional size and concentration of Switzerland's banking sector – also in comparison with other countries – also constrain this country not to be “middling” when it comes to crisis detection and supervision but rather to play a leading role both in the domain of early detection and reforms in the international scene, and in the implementation of best practices in the field of banking supervision.

In this context, the CCs' main concerns regarding the Swiss authorities' ability to detect financial market crises are caused by i) the dependence of the FBC/FINMA on information received from third parties such as banks, the central bank, auditing organs and rating agencies; ii) the lack of a follow-up of their own criticisms and observations; and iii) the lack of a critical attitude on the part of all the authorities involved.

The CCs conclude that firstly, the objectives have to be clarified and defined more precisely in order to be able to formulate clear and realistic demands with regard to the roles and responsibilities of the authorities, and that secondly, the organisation, resources and instruments have to be analysed to enable the authorities to stand their ground in their relations with the big banks and other institutions that have to be supervised, and to meet the challenges regarding financial and economic stability that emanate from them.

The CCs are in disagreement with the conclusion reached by the Federal Council in its report of 12 May 2010, according to which there is no need for any further legislation in this field. Indeed, the CCs are convinced that the appropriateness of the objectives specified for the authorities charged to supervise the financial markets and financial stability should be reviewed and that these authorities should be given the competence required to attain these objectives (Recommendation 2).²¹

In view of past experience and of certain practices that have proved effective in other countries, the CCs are convinced that Swiss supervision practices should still be further developed. In particular, FINMA should quickly put the strategic objectives it defined in September 2009 into concrete form (Recommendation 3).²²

²⁰ Chapter 2.10.2.

²¹ Chapters 2.3, 2.3.4 and 2.10.2.

²² Chapters 2.7.1.4, 2.9.4.2 and 2.10.2

The CCs are of the opinion that the SNB and FINMA will also have to increase the diversification of their sources of information. There is a danger that the most critical views are not accorded sufficient weight although they are essential in that they provide food for thought and indicators for early detection. The CCs are convinced that the SNB and FINMA will have to avoid the risks inherent in groupthink and develop adequate contacts, structures and information channels to fill this gap. In future, the SNB and FINMA will have to be able to rely on established and institutionalised connections to independent experts (Recommendation 4).²³

In the view of the CCs, early detection requires the authorities to institute an optimal degree of coordination at the level of information exchange. The stability of the Swiss financial system strongly depends on the quality of banking supervision. Then again, banking supervision in turn strongly depends on the quality of the analysis of the stability of Swiss and international financial systems. Thus intensive, close and regular cooperation between the SNB and FINMA is an indispensable and essential requirement to ensure that the stability of the financial system is safeguarded and that banking supervision is effective (Recommendation 5).²⁴

The CCs have observed that even within the FBC itself, the exchange of information at the same level between people who are concerned with the supervision of UBS and those who are concerned with the supervision of Credit Suisse has clearly been inadequate. The Federal Council must verify the adequacy of the procedures and the new organisation of FINMA (Recommendation 6).²⁵

4. Adequate crisis management by the Swiss authorities

The CCs are in agreement with the views of international organisations such as the IMF and the OECD and of the experts commissioned by both the Federal Council and by the CCs themselves that measures taken by the Swiss authorities were adequate, taking into account the positive effects they had on the country's financial and economic stability.²⁶

In the view of the CCs, these measures were taken at the right time, proved to be effective, were appropriate to the situation, and were financially sustainable for the Confederation. The CCs also refer to the excellent reputation the Swiss authorities enjoyed in international organs before, during and after the crisis.²⁷

5. The necessary implementation of the lessons to be learned from the crisis

The numerous parliamentary interventions at national level and the no less numerous discussions at international level illustrate the will and the necessity to learn lessons from the crisis.²⁸

The CCs emphasise that two years after the intensification of the financial crisis that prompted the Swiss authorities to develop possible intervention options for the

²³ Chapters 2.3.4.3 and 2.10.2.

²⁴ Chapters 2.3 and 2.10.2.

²⁵ Chapters 2.3, 2.9.4.1 and 2.10.2.

²⁶ Chapters 2.5, 2.7 and 2.10.3.

²⁷ Chapter 2.10.3.

²⁸ Chapter 2.9.

contingency of a UBS bankruptcy (March 2008), the time window for the introduction of adequate reforms is closing. Although the problems regarding the big banks' compensation policies and bonuses, banking supervision, financial stability and the banks that are too big to fail have been recognised, measures must now be expressed in concrete terms. The CCs are of the opinion that this work must no longer be delayed. In this context, the CCs hold the view that the Federal Council must examine in depth all the recommendations proposed by the experts that it commissioned (Recommendation 7).²⁹

6. The Federal Council's insufficient information basis

Between December 2007 and April 2008, the Federal Council was not informed about the preparations drawn up by the FDF, the SNB and the FBC although those months were the most important with regard to the FDF's intervention. Indeed it was during that period that UBS sustained massive losses, that the crisis management organisation became active and that after alarm signals from the SNB and FINMA, the FDF became involved in the preparation of possible intervention options.³⁰

Consequently, the CCs have arrived at the following two conclusions:

- the Head of the FDF was well informed by the FFA, the SNB and the FBC but in turn did not sufficiently inform the Federal Council, which lack he justified with his fear of indiscretions and their impact on the stock exchange. This is why the Head of the FDF managed this case on his own without wanting to involve the Federal Council;
- the members of the Federal Council were satisfied with this state of affairs and did not gather sufficient information themselves, thus failing to assume their responsibilities.³¹

Although the logic of a very restrictive communication policy on the part of the Head of the FDF is understandable in view of the very sensitive nature of the information and the serious consequences its publication would cause, the CCs are particularly disconcerted by the fact that the Federal Council is unable to work in a climate of trust and confidentiality. The CCs maintain that the stability and indeed the security of this country must not be jeopardised by the simple fact that the seven highest executives of the land are incapable of keeping a piece of information confidential within the government itself (cf. Motion 2 and Recommendation 15).

7. Defective steering on the part of the Federal Council

Between January 2008 (the point in time when the SNB and FINMA alerted the Head of the FDF to the situation) and September 2008, crisis management was in the hands of the Head of the FDF.

In April 2008, considering the economic consequences that might be caused by the failure of a big bank, the Head of the Federal Department of Economic Affairs (FDEA) was consulted with regard to the possible intervention options drawn up by

²⁹ Chapter 2.10.4.

³⁰ Chapter 2.8.2.

³¹ Chapter 2.10.5.

*the FDF, the SNB and the FBC. It strikes the CCs that the members of the Federal Council who were in possession of this information should have informed the government as a whole.*³²

Between April 2008 and September 2008, i.e. for five months, the Federal Council did not deal with the financial crisis.

*The CCs consider that the Federal Council did not pursue any steering activities in the context of the financial crisis before September 2008.*³³

From 21 September 2008 onwards, the Federal Council was more strongly involved because the situation of UBS and the absence of the Head of the FDF required it. From this moment onwards, the President of the Confederation directed the intervention of the Confederation, notably with the Head of the FDJP.

The CCs emphasise that although the strategy pursued by the President of the Confederation – i.e. the mobilisation of the Federal Council’s Committee for Economic Affairs in order to ensure a positive decision by the Federal Council with regard to the package of measures – actually worked, the CCs consider this course of action to be inadequate. The goal of a committee is to prepare an item in view of its treatment in the Federal Council; in cases of such great importance as the financial crisis, it must not be used to circumvent the decision-making process of the Federal Council as a whole, which in the CCs’ view would be tantamount to depriving the government of its collective responsibility. Moreover, the members of the Federal Council who were not part of the committee criticised the chosen course of action. The CCs agree with this criticism. In fact the three members had to make a decision only one day after they had learnt of the proposal concerning the commitment by the Confederation of 6 billion francs that implied a de facto commitment in the amount of 60 billion dollars on the part of the SNB (cf. Motion 3 and Recommendation 16).

In view of this, the CCs take note of the fact that:

- the Federal Council did not steer the management of the financial crisis;*
- the Federal Council only intervened when it had to make decisions concerning the package of measures, i.e. on 2 and 15 October 2008;*
- the Federal Council did not conduct reflections in order to find solutions in case of an aggravation of the crisis;*
- the Federal Council’s steering activities are defective despite repeated pertinent recommendations from the CCs in the wake of earlier inspections;*
- the Federal Council did not appear to have the essential means for concerted action when required by a crisis.*

For these reasons, the CCs hold that the Federal Council should make sure that, on the one hand, the steering problems known from earlier inspections by the CCs are solved (Recommendation 8) and that, on the other hand, it will be able to rely on an early crisis warning system at its own level (Recommendation 9).

³² Chapter 2.8.3.

³³ Chapter 2.10.6.

Investigation II: The authorities' conduct in connection with the disclosure of UBS customer data to the USA

1. The beginning of the affair

In December 2007, the FBC learnt about an investigation by the US Securities Exchange Commission (SEC) against UBS in connection with licensing obligations in the USA. Subsequently, the SEC submitted a request for mutual administrative assistance to the FBC, which did not, however, concern the disclosure of customer data. It was only in late February 2008 that UBS informed the FBC about an investigation currently being conducted by the US Department of Justice (DOJ), which aimed at the disclosure of UBS customer data. UBS itself had only just learnt about this demand by the DOJ in connection with an investigation by the American tax authority, the IRS, against UBS. As it would turn out, these three American investigations against UBS had been ongoing ever since autumn 2007 and concerned its cross-border business with private customers in the USA.³⁴

The DOJ's investigation was intended to clarify the role that UBS and its executives had played in the cross-border business with private customers in the USA in cases of fraud and tax evasion. In particular, the DOJ wanted to examine whether UBS, by setting up offshore structures for the benefit of customers subject to taxation in the USA, had deliberately infringed its contractual obligations towards the IRS or aided and abetted customers to circumvent US tax law. Like any other banks worldwide, UBS had entered into various obligations towards the IRS through a so-called Qualified Intermediary Agreement (QIA), among them reporting and tax withholding duties.³⁵

The basic idea of a QIA is to put financial institutions like UBS under the obligation to know the identities of customers who receive American capital gains, to categorise them according to the instructions of the IRS in terms of place of residence and status on the basis of the double taxation agreement (DTA), and if necessary fulfil reporting and tax withholding duties for the benefit of the IRS. With this instrument, the USA aims to prevent previous practices of people subject to taxation in the USA, which from the country's viewpoint were improper and led to significant tax losses for the USA, on the basis of double taxation agreements.³⁶

As it would turn out, UBS staff had helped American customers in some 300 cases to set up offshore structures, and in some cases had accepted false declarations in US forms in order to aid customers to fail to declare themselves as being subject to taxation in the USA.³⁷

2. The development of the case and the role played by the Swiss authorities

When the FBC learnt from UBS in early March 2008 that the American authorities were attempting to obtain UBS customer data through part of their investigations, it immediately recognised the import of this intention, whose impact reached above and beyond the FBC's banking supervision task. The FBC immediately consulted

³⁴ Chapter 3.2.2.2.

³⁵ Chapter 3.2.2.1.

³⁶ Chapter 3.2.1.

³⁷ Chapter 3.4.3.10.

representatives of the potentially affected federal administration units and informed them about the current situation together with representatives of UBS.³⁸

Subsequently, the Head of the FDF set up a working group, the “Karrer” working group. It consisted of representatives of the FFA, the Political Affairs Division V of the FDFA, the Federal Office of Justice (FOJ) of the FDJP, the Federal Tax Administration (FTA) of the FDF and initially also the Office of the Swiss Attorney General. It was chaired by the then head of the FFA’s Monetary Affairs and International Finance Division, Alexander Karrer.³⁹ The Swiss Embassy in the USA was also involved from that stage onwards.

To begin with, the working group did not perceive any immediate need for action.⁴⁰ This changed when in late April 2008, the American authorities arrested Martin Liehti, the then head of UBS’s North American business, and subsequently detained him as a material witness for a lengthy period of time and interrogated him with a view, among other things, to obtaining customer data.⁴¹ From this point in time onwards, it was clear to the working group that it had to become active in order to direct the US demand for customer data into constitutional channels. It examined the approach of both mutual judicial assistance and mutual administrative assistance, and it then opted for the latter since it was already clear at the time that the American authorities were seeking as early a disclosure of customer data as possible and that the procedure of mutual administrative assistance could be completed more quickly. The working group also preferred the mutual administrative assistance procedure because the American authorities did not know the alleged tax fraudsters’ names and were thus only able to submit a request to the Swiss authorities on the strength of a “pattern”, i.e. customers who meet certain criteria. In the working group’s estimate, it was more likely that such a request could be granted in the context of mutual administrative assistance.

In May 2008, indications emerged that UBS might also have infringed Swiss supervision law with its behaviour in its cross-border business with private customers in the USA, whereupon the FBC launched its own investigation against UBS.⁴² In addition, an investigation had been underway inside UBS since autumn 2007, which was conducted by an American law firm. Since the FBC would partially rely on data from this investigation, it commissioned a Swiss law firm to make sure that the UBS’s internal investigation was not being inadmissibly influenced by the UBS top management. At the same time, the FBC continued to provide the SEC with information in the context of the mutual administrative assistance request and was thus in contact with the American authorities.

3. The IRS’s request for mutual administrative assistance of 16 July 2008

In various telephone contacts and through the dispatch of a delegation headed by the Deputy Director of the FOJ to the USA, the American authorities were persuaded in early summer 2008 to have the IRS submit a request for mutual administrative assistance on the basis of the double taxation agreement to the FTA

³⁸ Chapter 3.2.2.3.

³⁹ Chapter 3.3.2.3.

⁴⁰ Chapter 3.3.1.

⁴¹ Chapter 3.3.2.

⁴² Chapter 3.3.2.4.

on 16 July 2008.⁴³ The Swiss Embassy in the USA and the Swiss Foreign Minister also advocated this approach. The IRS's submission of the request for mutual administrative assistance appeared to have achieved a certain détente in summer 2008. From the Swiss authorities' perspective, a way appeared to have been found of examining the US demand in accordance with the Swiss legal system and of disclosing customer data should the case arise.

The request for mutual administrative assistance placed a great strain on the FTA.⁴⁴ The FTA's competent International Division had only received an average of three requests for mutual administrative assistance per year worldwide; now, in summer 2008, it was being confronted with a request that covered several hundred cases. In mid-July 2008, the exact number was not known either to the American authorities or to the FTA. In late August 2008, the IRS stated its request for mutual administrative assistance in more precise terms, which meant that the number of cases concerned increased by roughly another 1600-1800 cases.⁴⁵ Initially, the FTA increased its personnel resources inside the administrative unit. In the final quarter of 2008 and in early 2009, it employed more human resources from outside the administration. On the strength of the pattern on which the request for mutual administrative assistance was based, UBS continually sent files to the FTA from mid-July 2008 onwards; by the end of 2008, they amounted to 348.⁴⁶

4. The American authorities' dissatisfaction with the mutual administrative assistance: demands for a quick disclosure of data outside the mutual administrative assistance proceeding

Towards the end of summer 2008, the FBC was engaged in discussions with the DOJ about the UBS's withdrawal from cross-border business with private customers in the USA. A representative of UBS had announced this step on the occasion of a hearing before a subcommittee of the US Senate. In this meeting, the FBC had to realise that the DOJ would only accept the dissolution of the cross-border customer relations by UBS if customer data were disclosed to the American authorities in advance. In September 2008, there followed an exchange of "non-papers" to reach an understanding between the DOJ and the FBC in this matter. In the event it was revealed that the American authorities did not regard a mutual administrative assistance proceeding as a suitable instrument for the fulfilment of its demands since the DOJ wanted to obtain the customer data fast and did not consider this as guaranteed by a mutual administrative assistance proceeding.⁴⁷ The Swiss authorities had been unable to completely dispel the American authorities' doubts concerning the mutual administrative assistance proceeding even before that date.

The FBC regularly forwarded its situation assessment and the information received from UBS and the American authorities to the former members of the Karrer working group although the working group no longer met after August 2008 and virtually no more meetings took place.

⁴³ Chapter 3.3.2.6 – 3.3.2.8.

⁴⁴ Chapter 3.3.3.4.

⁴⁵ Chapters 3.3.2.10 and 3.3.3.4.

⁴⁶ Chapter 3.3.3.4.

⁴⁷ Chapter 3.4.1.

On 19 September 2008, the Head of the FDF briefly informed the Federal Council as a whole about this case for the first time.⁴⁸

On 17 October 2008 in New York, UBS presented the results of its internal investigation in the presence of representatives of the three American authorities involved and of the FBC. The American law firm employed by UBS to conduct this investigation came to the conclusion, in particular, that a small number of UBS staff had helped customers to circumvent QIA provisions but that the management level of UBS could not be held responsible for the infringements.⁴⁹

On the same day, the FTA issued its first closing order in the context of the mutual administrative assistance proceeding.

5. The Swiss authorities' conduct up to 19 December 2008

On the basis of the American authorities' reactions on the occasion of the meeting of 17 October 2008 in New York, the FBC pinpointed an urgent need for action on the part of the Swiss authorities to enable a quick data disclosure to the USA. It was clear to the FBC that this could not be effected through a mutual administrative assistance proceeding. Consequently, it drew up possible intervention options for the Swiss authorities, which were adjusted by the Karrer working group and were then submitted to the Head of the FDJP, who was then deputising for the Head of the FDF, who had fallen ill. The possible intervention options ranged from insistence on a mutual administrative assistance proceeding via data disclosure by UBS on the strength of necessity in criminal law to data disclosure by the Federal Council based on its competence to act under emergency law. The option of the suspension of the delaying effect of an appeal against the FTA's closing orders was also considered. At this juncture, the involved members of the working group raised the question of the establishment of contacts at the highest political level, which had to be effected before the US elections on 4 November 2008. Such a contact was not then established before the elections in the USA.⁵⁰

From mid-October to mid-December 2008, indications were growing stronger that the American authorities regarded data disclosure by the end of 2008 as necessary and were now seriously considering the indictment of UBS in the USA, a contingency that had been considered by the American authorities again and again to a greater or lesser extent since spring 2008.⁵¹ All the Swiss representatives and UBS were in agreement from the very beginning that such legal action would endanger UBS's existence. These indications did not only come from the DOJ and the IRS and the FBC but also from the American Central Bank, the Fed, and SNB and UBS, which continued to try to find a solution with the American authorities by itself. In its contacts with the Fed, the SNB was repeatedly made aware of the seriousness of the situation and the urgent need for action.⁵² A clear stand was taken by the American authorities with the indictment of Raoul Weil, GWM&BB of UBS, on 12 November 2008 in the USA.⁵³ The UBS Board of Directors wrote to the

⁴⁸ Chapter 3.4.1.4.

⁴⁹ Chapter 3.4.2.4.

⁵⁰ Chapters 3.4.3.1 and 3.4.3.2.

⁵¹ Chapters 3.4.2 and 3.4.3.

⁵² Chapter 3.4.4.3.

⁵³ Chapter 3.4.3.4.

Presidents of the SNB and the FBC on 10 December 2008, describing the worrying situation in which UBS found itself.

This information was forwarded to top civil servants at FFA (as well as to the former members of the Karrer working group), but partially also directly to the Head of the FDF and, in certain cases, to the Head of the FDJP. Thus at a meeting on 18 November 2008, for instance, the FBC informed the Head of the FDF and the Head of the FDJP about the situation and the urgent need for action in unequivocal terms.⁵⁴

The FFA, the involved representative of the FTA and the FOJ apprehended the increasing pressure on UBS. The FFA and the FBC jointly drew up situation analyses again and again, also for the attention of the Head of the FDF, and repeatedly updated the possible intervention options, whereby the continuation of the mutual administrative assistance proceeding or data disclosure by UBS continued to constitute options and whereby any data disclosure outside these two variants was regarded very critically.⁵⁵

At the top level of the two ministries involved, matters were examined and considered, but ultimately only a few measures were taken: on 10 November 2008, a letter from the Head of the FDF and the Head of the FDJP was sent to the US Treasury Secretary and the US Attorney General, which particularly emphasised the Swiss government's willingness to seriously examine data disclosure in the context of a mutual administrative assistance proceeding. This letter also mentioned the significance of UBS for financial stability and the Confederation's support measures for the benefit of UBS. This letter was never answered.⁵⁶ On 15 December 2008, the Head of the FDF called the two American ministers, but only the Attorney General was available for a discussion. The Head of the FDF again explained the gist of the letter to the Attorney General and succeeded in having the deadline for data disclosure extended. An attempt on the part of the President of the Confederation to reach the American President at this time is said to have failed.⁵⁷

In December 2008, the FBC indicated to UBS that the latter should continue its negotiations with the American authorities on the assumption that a data disclosure would be possible. The FBC informed the bank that in the last resort, it could rely on the FBC's support in the matter of data disclosure. This resulted in a situation whereby the American authorities showed willing to defer legal action for the time being.⁵⁸

6. The Federal Council's treatment of the case until 19 December 2008⁵⁹

On 19 September 2008, the Head of the FDF briefly informed the Federal Council for the first time about this case.⁶⁰ Throughout October and until 26 November 2008, the Federal Council did not actively deal with UBS's difficulties in the cross-border business with the USA. The case was then discussed at the meetings of 12 and 16 December 2008. On 12 December 2008, the President of the SNB informed

⁵⁴ Chapter 3.4.3.4.

⁵⁵ Chapters 3.4.4.4 ff.

⁵⁶ Chapter 3.4.3.3.

⁵⁷ Chapter 3.4.4.5.

⁵⁸ Chapter 3.4.4.2.

⁵⁹ Chapter 3.4.3.

⁶⁰ Chapter 3.4.1.4

the Federal Council about his profound anxiety caused by the most recent development in the tax dispute between UBS and the financial authorities. He explained, among other things, that legal action was imminent and that this could effectively lead to UBS being ruined. At the subsequent meeting, the Head of the FDF discussed three possible intervention options that had been drawn up. Besides insisting on a mutual administrative assistance proceeding and the initiation of negotiations with the USA to revise the DTA, data disclosure either on the strength of the Federal Council's competence to act under emergency law or pursuant to Articles 25 and 26 of the Banking Act remained options. At the suggestion of the Head of the FDF, the Federal Council preferred a course of action based on the Banking Act. On 19 December 2008, the Federal Council adopted a resolution to request the FBC to take all the necessary measures to prevent any unilateral coercive measures on the part of the DOJ that would jeopardise UBS's existence. Thus the ball was back in the FBC's court.⁶¹

7. Final report on the FBC investigation of 17 December 2008 and FBC Decision of 21 December 2008

The FBC took cognisance of the final report on its investigation on 17 December 2008.⁶² The investigation revealed that the culpable activities of UBS, respectively of some individuals of its staff, in the domain of the cross-border business with private customers in the USA were incompatible with the guarantee of irreproachable business activity and therefore had to be objected to under Swiss banking supervisory law. Also, the legal risks associated with such business had not been adequately handled by the bank. Moreover, the investigation established that no indications had been found of any active knowledge on the part of Marcel Rohner and Peter Kurer of the infringements of QIA obligations.

Subsequently, on 21 December 2008, the FBC decreed that UBS would not be permitted to continue the non-W9 business. Fully aware of the Federal Council's request of 19 December 2008, the FBC also adopted the previously reserved resolution to order data disclosure pursuant to Articles 25 and 26 of the Banking Act if this should be the only way of averting an indictment of UBS.⁶³

In late December 2008, the IRS indicated that it would not want to be involved in a global settlement with UBS.⁶⁴ This information was confirmed in mid-January 2009 by the Fed and the SNB,⁶⁵ as well as by the Swiss Embassy in the USA.⁶⁶ Further confirmations followed in February 2009.⁶⁷

8. Developments in 2009

In early 2009, UBS continued its negotiations with the American authorities in order to arrive at a solution to as many of their demands as possible in the context of a settlement. On the occasion of these negotiations, a revision of the DTA was also

⁶¹ Chapter 3.4.3.11.

⁶² Chapter 3.4.3.10.

⁶³ Chapter 3.5.1.1.

⁶⁴ Chapter 3.5.1.1.

⁶⁵ Chapter 3.5.1.5.

⁶⁶ Chapter 3.5.1.8.

⁶⁷ Chapter 3.5.1.11.

taken into consideration. The Swiss Embassy in the USA and FINMA (the FBC had been integrated into FINMA on 1 January 2009) were regularly informed by the Group General Counsel of UBS, who led the negotiations. Both the Swiss Embassy and FINMA forwarded this information. Thus FINMA informed the Head of the FDF on 8 January 2009 that the central condition for the conclusion of a settlement was the immediate disclosure of approximately 250 customer data sets outside the mutual administrative assistance proceeding and that any possible disclosure of such data by FINMA would have to be politically embedded by the Federal Council.⁶⁸ The relevant civil servant in the FFA continued to be informed and kept the Head of the FDF posted about the development by means of situation analyses.⁶⁹ In early February 2009, the relevant civil servant in the FFA was sceptical about data disclosure outside the mutual administrative assistance proceeding, preferring data disclosure by UBS itself or responsibility for the case being taken over by the Federal Council (negotiations about a revision of the DTA).⁷⁰

In January and February 2009, the FTA continued to express reservations concerning new negotiations about the DTA and the benchmark figures of the settlement between UBS and the American authorities.⁷¹ The proposal was made that the FDF should again take this case in hand.⁷² On 28 January 2009, the Head of the FDF informed the Federal Council about the status of the mutual administrative assistance proceeding and the settlement negotiations of UBS. In particular, he informed the government of the fact that the IRS wanted to view 19,000 customer data sets. At the WEF, which took place in late January 2009, the Head of the FDF tried to persuade the American President's personal adviser to accept a solution in mutual respect for both legal systems.

In January 2009, neither the Swiss Embassy in the USA nor the FTA and the FFA completely ruled out the possibility of the IRS still agreeing to a global settlement.⁷³ UBS, FINMA and the SNB on their part, however, no longer considered this to be possible.

On 1 February 2009, the Vice Chairman of the UBS Board of Directors informed FINMA that the filing of an action was imminent. Four days later, he informed in writing the Head of the FDF and the Presidents of FINMA and the SNB that UBS's negotiations with the USA were about to be concluded but that no solution had until then been found with regard to the IRS's demands. He asked the Swiss government to recognise the solution that had been found.⁷⁴

On 11 February 2009, the Head of the FDF informed the Federal Council about the state of affairs. He also mentioned that the IRS was not part of the settlement. The Federal Council discussed the situation with a certain amount of anxiety and charged the FDF to prepare a negotiation paper for a possible adaptation of the DTA.

A note drafted by the American lawyer retained by the Swiss Embassy in the USA of 12 February 2009 clearly expressed the fact that a disclosure of customer data in

⁶⁸ Chapter 3.5.1.4.

⁶⁹ Chapter 3.5.1.9.

⁷⁰ Ibid.

⁷¹ Chapters 3.5.1.6, 3.5.1.8 and 3.5.1.12.

⁷² Chapter 3.5.1.8.

⁷³ Chapter 3.5.1.8.

⁷⁴ Chapter 3.5.1.10.

*the context of an agreement between UBS and the DOJ would put the Swiss authorities under a great deal of pressure to approve further exemptions from banking secrecy or the mutual administrative assistance proceeding.*⁷⁵

On the following day, the UBS Board of Directors again pointed out the bank's predicament to FINMA. In this letter from UBS, FINMA was requested to order the data disclosure.⁷⁶ On the same day, FINMA sent the Federal Council as a whole a status report in which it announced that the Executive Board requested FINMA's Board of Directors to order the data disclosure on 18 February 2009.⁷⁷

On 17 February 2009, the final agreement between the DOJ, the SEC and UBS was being negotiated. On the same day, the DOJ sent a letter to UBS in which it threatened to seek the indictment.⁷⁸

9. The disclosure of bank customer data to the USA, and its consequences

On 18 February 2009, the Federal Council was again informed by the Head of the FDF. He discussed the course of action that was announced for the afternoon by FINMA in controversial terms but ultimately stuck to his decision of 19 December 2008. He also decided not to send a Swiss representative to the hearing of the US Senate Subcommittee, which had been postponed until 24 February 2009. Also on the afternoon of 18 February 2009, FINMA ordered the disclosure of customer data as a protective measure pursuant to Articles 25 and 26 of the Banking Act. The transfer of these data to the American authorities by FINMA was also effected on the same day.⁷⁹ The general public was subsequently informed.⁸⁰

The disclosure of UBS customer data to the American authorities had a variety of effects: on 19 February 2009, the IRS reactivated the John Doe Summons (civil suit) against UBS. Confronted with the pressure exerted by the EU and the OECD, the Federal Council decided on 25 February 2009 to enlarge upon the current conflict with the USA in view of Switzerland's role as a financial centre and of negotiations with the EU and the USA in order to be able to take measures. The Federal Council set up a committee for this purpose.⁸¹ A temporary injunction issued by the Federal Administrative Court was too late for the disclosure of bank customer data to be prevented.⁸²

On 13 March 2009, the Federal Council informed the general public that Switzerland intended to take over the OECD standard of mutual administrative assistance in tax matters. Subsequently the Swiss authorities initiated new negotiations about the DTA with the USA in order to find a solution that would also cover the IRS's civil action against UBS. In mid-August 2009, these negotiations resulted in an agreement between Switzerland and the USA concerning an IRS request for mutual administrative assistance in respect of UBS, which entered into force on 19 August 2009. This agreement provided, among other things, that the

⁷⁵ Chapter 3.5.1.14.

⁷⁶ Chapter 3.5.1.15.

⁷⁷ Chapter 3.5.2.1.

⁷⁸ Chapter 3.5.2.2.

⁷⁹ Chapter 3.5.2.4.

⁸⁰ Both by a media release by FINMA and by a declaration issued by the Federal Council; cf. Chapter 3.5.2.5.

⁸¹ Chapter 3.5.4.1.

⁸² Chapter 3.5.4.1.

IRS's civil action – the John Doe Summons – would be transformed into a regular request for mutual administrative assistance and that the USA would waive any unilateral measures for the enforcement of the IRS's demands. On the other hand, Switzerland undertook to process a maximum of 4,450 cases in the context of this new request for mutual administrative assistance within a year. For this purpose, the Swiss authorities established a large-scale project organisation and also discussed the course of action with the Federal Administrative Court.⁸³

10. Assessment and conclusions of the CCs

Before the CCs' assessment of the authorities' conduct is dealt with, it is important to be reminded that this affair was caused by misbehaviour on the part of UBS and the bank's staff. The investigations of the American authorities then led to a situation whereby the Swiss authorities had to deal with the behaviour of UBS. However, the way in which the American authorities proceeded revealed a lack of respect for the Swiss legal system. The CCs condemn both behaviour patterns in the strongest possible terms.⁸⁴

11. FBC/FINMA

FBC/FINMA played a central role in the efforts to cope with the problems that arose from UBS's cross-border business with private customers in the USA and from related investigations. It recognised early on that these investigations could potentially result in a clash between the American and Swiss legal systems and soon involved the central Federal Administration. The representative of the FBC actively participated in the search for a solution by the Karrer working group.

From autumn 2008, the FBC continued to provide authoritative impulses for the attention of the Federal Administration units that were involved and of the Head of the FDF. The first written options for action, which were based on the competencies of the Federal Council and the Federal Administration rather than on those of the FBC, came from the FBC. In the CCs' view, however, this raises the question as to whether other authorities did not effectively remove themselves from responsibility at least partially in this way. From the CCs' perspective, FBC/FINMA has to accept the reproach that at no time did it draw attention to the serious situation and its urgency in a formal letter addressed to the Federal Council as a whole. The CCs maintain that in future, the Chairman of FINMA has to have guaranteed access to the Federal Council and its Committee for Economic Affairs (Motion 1).

It was again the FBC which – seen from the angle of that time – deblocked the situation in December 2008 when it drew up the proposal of a data disclosure pursuant to the Banking Act and sent a signal to UBS to the effect that in an emergency, a data disclosure would also be possible outside the mutual administrative assistance proceeding. Finally, in 2009, FBC/FINMA's course of action and leadership enabled it to achieve at least a partial solution to the problem and to prevent the indictment that would have jeopardised UBS's existence.

⁸³ Detailed explanations concerning the stage after 18 February 2009 can be found in Chapter 3.5.4.

⁸⁴ Chapter 3.6.8.1.

FBC/FINMA was also responsible for the mutual administrative assistance proceeding initiated by the SEC. In the context of its supervisory activities, the FBC also conducted its own investigation against UBS and assessed UBS's internal investigation. However, since the FBC's investigation substantially depended on the findings of UBS's internal investigations and since the FBC stated that there were no indications of Marcel Rohner and Peter Kurer having any "active" knowledge of the transgressions, the FBC's investigation did not manage to convince the CCs.

The CCs regard it as important that in view of the great momentousness of this affair, the question as to how much the top management of UBS knew about the bank's QIA infringements has to be examined in depth by FINMA even without any current legal protection interests. If similar cases should occur in the future, the question as to whether the irreproachability of business activities is guaranteed should be asked ex officio and investigated systematically (Recommendation 10).

This inspection by the CCs has revealed that the Swiss banking supervisors' dependence on the banks, which came to light at various times, must be reduced. Thus it must be stated retrospectively that until December 2007, the FBC had no indications of deficiencies in the cross-border business of UBS. The CCs also hold the view that the FBC accorded too little weight to risks inherent in QIAs, particularly with regard to the Swiss legal system, and will generally have to pay more attention to the compliance risks in the banks' cross-border business in future.

The CCs rate the information flow and cooperation between FBC/FINMA and the Federal Administration and the SNB in this case as good.

Besides, the CCs reached the conclusion that in serious cases, FINMA should clarify unequivocally whether a bank's top managers have satisfied the requirements regarding conduct of irreproachable business activities before it approves its formal discharge. This leads the CCs to the conclusion that the competent legislative commissions should review the legal provisions governing the approval of formal discharge by annual general assemblies in the banking sector (Recommendation 11).⁸⁵

The CCs identified a further need for action in the role played by auditing firms: the auditing firm of UBS had not created any added value in respect of the disclosure of the problems of UBS's cross-border business in the USA. The CCs therefore requests Parliament to instruct the Federal Council to review the definition in Swiss legislation of the role that auditing firms play in the audits of big banks (Postulate 1).⁸⁶

12. Swiss National Bank

The SNB did not only repeatedly intercede with its American counterparts on behalf of the Swiss authorities but guaranteed from as early as summer 2008 that crucial information about the danger of an action being filed against UBS was transmitted to the competent Swiss authorities. The SNB must also be credited with having informed the Federal Council about the inherent risks of the case in clear-cut terms in mid-December 2008. Accordingly, the SNB will have to continue to assume the part of the guardian and preserver of Swiss financial stability before the political

⁸⁵ Chapter 3.6.1.6.

⁸⁶ Chapter 3.6.1.7.

and administrative authorities, and taking into account its central role for the preservation and survival of Switzerland as a financial centre, it will have to be in regular contact with the Federal Council (Recommendation 12).⁸⁷

13. Federal Department of Finance

*In May 2008, the FDF reacted very fast and set up a correctly constituted interdepartmental working group. However, the concept behind the working group was unconvincing. It did not have either a written mission or special competencies and therefore did not extensively tackle issues such as the problems of data disclosures and the erosion of banking secrecy at an early stage. It limited itself to leading the American authorities onto the path of mutual administrative assistance and then ceased to exist in its original form. Although as a rule, a majority of the members of the working group remained in the information flow even after mid-July 2008, the information they received only rarely resulted in explicit requests to superior units. The CCs cannot but blame the Head of the FDF, who was in charge of the project organisation, for these deficiencies.*⁸⁸

*With regard to the question of data disclosure, the FDF advocated the use of mutual administrative assistance so as to comply with the American authorities' request as quickly as possible within the limits imposed by the Swiss legal system. However, it misjudged the problems of this approach in that it did not conduct any advance examinations of the appropriateness of the FTA's human resources and did not take any corresponding measures. The Head of the FDF, too, failed to initiate the necessary investigations inside his ministry in good time and then to take the requisite measures in order to guarantee that the request for mutual administrative assistance from the USA would be processed quickly. The CCs also find fault with the FDF's insufficient consultation of the Federal Administrative Court with regard to the FFA's and the Federal Administrative Court's course of action in the context of the mutual administrative assistance proceeding. In this way, an important opportunity to deal with the US demands in a constitutional manner in good time was wasted. As the summer of 2009 would reveal, the establishment of adequate general conditions would basically already have been possible at that particular stage.*⁸⁹

The CCs' inspection revealed that the Head of the FDF was always well informed about the latest developments in this case and that the information he received from actors outside his ministry was invariably reliable. On the strength of his political views, however, the Head of the FDF always assumed that a government measure for the disclosure of bank customer data outside a mutual administrative assistance proceeding would only be a measure of last resort. This meant that further measures were only examined once there was effectively no scope left for them. This also explains why the FDF involved the Federal Council as a whole too late. An early exploitation of the scope of action would have been contingent, among other things, on the existence of a comprehensive strategy for Switzerland's role as a financial centre. Through his conduct, the Head of the FDF deprived himself of the exploitation of potential intervention options on the part of the FDF and the Federal Council. From the CCs' perspective, this was a fatal error. Although the CCs were

⁸⁷ Chapter 3.6.2.

⁸⁸ Chapter 3.6.3.1.

⁸⁹ Chapter 3.6.3.2.

unable to clarify conclusively to what extent the Head of the FDF followed the difficult situation in the FTA, the development of the case compels the CCs to conclude that he paid insufficient attention to it. This was also reflected in the information about the case that he gave to the Federal Council as a whole.⁹⁰

In addition, the CCs judge cooperation between the Heads of Department concerned – FDF, FDFA and FDJP – as inadequate. This case was not discussed in regular bilateral or trilateral meetings at this level. There were only occasional bilateral meetings between the Head of the FDF and the Head of the FDJP.⁹¹

The FDF, which was in charge of the case, but also the Federal Council as a whole, also failed to undertake an in-depth legal analysis of the intertion options outside mutual administrative assistance or to have such options examined: the FDF did not consider either the Federal Council's competence under emergency law or a disclosure pursuant to Articles 25 and 26 of the Banking Act in depth. The aspect of state liability, in particular, was not taken into sufficient account by the FDF.⁹²

14. Federal Department of Foreign Affairs / Federal Department of Justice and Police

The Swiss Embassy in the USA, the Political Affairs Division V of the FDFA, and the FOJ played an important part in dealing with emerging issues and, within their respective competencies, did everything in their power to channel the problems triggered by the American investigations towards an orderly solution. However, the CCs would have welcomed a further-reaching involvement of the FOJ, for instance with regard to emergency law and state liability law. For the future, they address a recommendation along these lines to the Federal Council (Recommendation 14), which suggests a systematic involvement of the FOJ for the benefit of the Federal Council.

In both Departments, the General Secretariat would have had to be integrated into the information flow and to play an active role; this also applies to the FDFA's State Secretary. Whether this was the case in the FDFA could not be clarified conclusively. In the FDJP, the General Secretariat was not involved. When it comes to important business, this must be guaranteed in all Departments in the future (Recommendation 13).

A further parallel between the two Departments is constituted by the fact that both Heads received, or could have received, in-depth information about this case through the administrative units reporting to them or due to the fact that the Head of the FDJP was the Deputy of the Head of the FDF, but did not make sufficient use of this information to be able to adequately exercise their responsibility as government members in the Federal Council. Both Departments also failed to subject the problems of the case to a broader analysis within their own respective competencies.⁹³

15. Federal Council

⁹⁰ Chapter 3.6.3.3.

⁹¹ Chapter 3.6.3.4.

⁹² Chapter 3.6.3.5.

⁹³ Chapter 3.6.4.

- *Deliberate relinquishment of minutes in the UBS case*

The then President of the Confederation resolved on 26 September 2008 that no minutes would be taken of the Federal Council meetings in the UBS case for reasons of confidentiality. This was not opposed by either the other members of the Federal Council or by the Federal Chancellor. This resolution remained effectively applicable into the following year. The only record of this case from that time consists of a summary in note form compiled by the Federal Chancellery. The CCs are of the opinion that this is unacceptable: the criterion of written records must be preserved in all situations, i.e. also in secret cases or with information that is transmitted only verbally, and the Federal Council as an organ must be capable of dealing with delicate information.

The minutes of the Federal Council should serve as an instrument of leadership. Also, they must guarantee the later confirmability of the Federal Council's deliberations and resolutions. In a motion, the CCs request Parliament to instruct the Federal Council to enshrine in law the obligation to keep written records of its deliberations and resolutions at all times (Motion 2). In a recommendation, the CCs invite the Federal Council to provide itself with the resources required for adequate and quickly available minutes and auditing procedures (Recommendation 15).⁹⁴

- *Inadequate information basis for the exercise of leadership responsibility*

In the case of the UBS's cross-border business in the USA, the Federal Council did not possess the information required to exercise leadership responsibility, or it received such information much too late. Owing to this, the Federal Council underestimated the far-reaching consequences of this conflict for Switzerland as a financial centre for too long and deprived itself of any scope of action whatsoever.

Finally, in December 2008, the Federal Council abdicated responsibility entirely by leaving it to the FBC to take the necessary measures to rescue the bank from its collapse. In terms of national policy, this is also questionable because, among other things, the Federal Council had not previously examined the legal situation in detail and in depth.⁹⁵

- *The Federal Council's outdated deputising system*

The CCs examination of the problems surrounding the cross-border business of UBS reveals that the Federal Council's present deputising system needs to be adapted in several respects. Thus the Head of the FDJP as the deputy of the Head of the FDF had neither been informed by the Head of the FDF about this important case in advance, nor did the FDF's internal organisation permit an effective substitution during the absence due to illness of the Head of the FDF. In addition to this, the files have not been correctly transmitted to the Head of FDF at his return. Also, the Head of the FDF was dealing with departmental business off and on during his convalescence. The CCs therefore recommend that the Federal Council should adapt its deputising system to the requirements of modern government activities (Recommendation 16).⁹⁶

⁹⁴ Chapter 3.6.5.1.1.

⁹⁵ Chapter 3.6.5.1.2.

⁹⁶ Chapter 3.6.5.1.3.

- *Reinforcement of the Federal Council's committees by way of compensation for the excessive emphasis on the departmental principle*

From the CCs' perspective, the Federal Council's self-conception as a collegial body – which is characterised by a far-reaching departmental approach – proved to be the main obstacle to an adequate and early involvement of the Federal Council as a whole. Repeated enquiries in the Council about a certain case are conceived of as attacks on the principle of collegiality or involve the danger of being understood as such. The instrument of accompanying reports is also used only reluctantly to make sure that the head of the department that is in charge will not feel under personal attack. To create an equilibrium between the departmental principle and the principle of collegiality, the CCs are of the opinion that the instrument of committees of three Federal Councillors should be employed more frequently and more systematically, and it should be enshrined in law (Motion 3). The instrument has proved useful, in particular, since March 2009 with regard to negotiations with the USA.⁹⁷

- *Strengthening the Federal Council's collective responsibility*

The CC's' inspection at hand revealed that the Federal Council did not assume its collective responsibility as a collegial council and as the country's highest executive authority in regards to the UBS cross-border business case. On the one hand, this is due to the Federal Council's self-conception as a collegial body and on the other hand, it can also be accounted for by the too far reaching departmental principle. This serious conclusion, which had to be similarly drawn in previous inspections, urgently calls for action. By way of a motion and a recommendation, the CC's demand measures within the current government reform in order that the Federal Council steers the important affairs as a collegial body not only formally but also effectively and assumes collectively the corresponding responsibility (Motion 4 and Recommendation 17).

16. Federal Chancellery

Even though the Federal Chancellery made an important contribution by drafting summary minutes after the event to ensure that the Federal Council's deliberations could be confirmed at least in their outlines, the CCs come to the conclusion that the Federal Chancellery fulfilled its function as the staff office of the President of the Confederation and the Federal Council only very insufficiently. In future, the Federal Chancellery will have to exercise its function in a more extensive manner and with more assertiveness. The CCs consider this to be an important point in today's pending government reform. As an immediate measure, the CCs have formulated the recommendation of a comprehensive control by the Federal Chancellery with regard to tasks assigned by the Federal Council as a whole to one or more Departments (Recommendation 17).

17. Federal Administrative Court

⁹⁷ Chapter 3.6.5.1.4.

The Swiss authorities informed the Federal Administrative Court poorly and too late about the requests submitted by the American authorities and the mutual administrative assistance proceeding subsequently initiated by the FTA. According to the Federal Administrative Court, it only learnt about this case in the media on 17 October 2008, on the occasion of the first closing order of the FTA. Even if a contrary piece of information received from the FTA, namely that the Federal Administrative Court had already been contacted in September 2008, should be true, the Federal Administrative Court would still have been informed too late. The Court was also insufficiently informed about the constantly increasing urgency of customer data disclosure. It must be appreciated that in autumn 2008, the Federal Administrative Court was indeed available for a meeting with the FTA, and such a meeting did take place. The CCs also noted that the Federal Administrative Court took organisational measures within the range of its possibilities in order to be able to deal with potential appeals against closing orders quickly. The first ruling was then given on 5 March 2009.

The Federal Administrative Court learnt about FINMA's decision of 18 February 2009 in the press and immediately responded with temporary injunctions.⁹⁸

18. Further findings of the CCs

In addition, the CCs' inspection gave rise to the following four general remarks:

- Two factors limited a successful search for a solution. Firstly, people both at the level of the Federal Administration and at the level of the Federal Council were unwilling for too long to query the issues surrounding the differentiation between tax evasion, tax fraud and Article 26 of the OECD Model Convention in the light of events. Secondly, the assessment of the representatives of the Administration and of the Federal Council whereby UBS had caused the problem itself and must therefore also solve it by itself, exerted a negative influence on the search for a solution.⁹⁹*
- The authorities had insufficient initial information. The CCs noted contradictory statements about the initial situation. Thus representatives of the Administration put on record that until summer 2008, UBS had repeatedly indicated that the problem might be solved with a settlement, whereas UBS representatives informed the CCs that it had been clear early on that a settlement could not be reached without data disclosure. Situation assessments by the Swiss authorities were often excessively dependent on UBS and therefore arrived at conclusions that were not sufficiently clear.¹⁰⁰*
- There are uncertainties as regards the conformity of the QIA with the Swiss legal system and with its authorisation in accordance with Article 271 of the Swiss Criminal Code. On 7 November 2000, the FDF granted the persons dealing with the application of the QIA an authorisation in accordance with Article 271 of the Swiss Criminal Code to enable these persons to conduct the activities provided in the agreement (QIA) for the benefit of the IRS. The CCs located a need for more in-depth clarification in this area: thus the question arises, to begin with, whether the granting of such a (global)*

⁹⁸ Chapter 3.6.7.

⁹⁹ Chapter 3.6.8.2.

¹⁰⁰ Chapter 3.6.8.3.

authorisation without a time limit to a circle of indeterminate people was permissible in the first place, and what instance would have had to grant such an authorisation. The CCs instruct the Federal Council to clarify the issues surrounding the application of Article 271 of the Swiss Criminal Code and the compatibility of the QIA with Swiss bank customer secrecy in an in-depth report (Postulate 2).¹⁰¹

- *Creditor losses through asset reduction/mismanagement: in view of the events in the UBS case and the CCs' findings in this respect, the CCs request Parliament to instruct the Federal Council to propose a revision of Articles 164 and 165 of the Swiss Criminal Code to extend their applicability to large-scale corporations if these have to be saved from collapse by government intervention owing to their systemic significance for the Swiss national economy and financial stability (Motion 5).¹⁰²*

19. CCs remind UBS of its duties

The CCs observed the existence of a deep public need for transparency with regards to the bank's internal actions and responsibilities. Therefore the CCs called on the Federal Council and UBS to thoroughly have the bank's internal action examined by an independent body and to publish the results (Recommendation 19).

Further course of action

After the CCs have fulfilled their function of parliamentary supervision, it is now incumbent upon the authorities involved, particularly the Federal Council, to take the necessary measures. The CCs expect the Federal Council, FINMA and the SNB to respond to their inspection by the end of 2010.

¹⁰¹ Chapter 3.6.8.4.1.

¹⁰² Chapter 3.6.8.4.2.