

Peter V. Kunz: «Credit Suisse Can Also Be Seen As a Victim»

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After its final annual general meeting, Credit Suisse is likely to face several lawsuits. But the financial market supervisory authority also faces accusations of failure, explains business lawyer Peter V. Kunz in an interview with *finews.com*.

Mr. Kunz, how do you see the chances of an intentional or negligent breach of duty by current and former executives of Credit Suisse, especially in 2020 and 2022, for which there was no discharge of business activities?

In the recent past, Credit Suisse should be seen as a victim. Because of the plunge in the share price in recent weeks, the bank's management can therefore not be blamed.

On the other hand, the various internal and external scandals of the past five years including Spygate, Mozambique, Archegos, and Greensill could certainly be blamed causally on the bank's management. For an indictment, negligence is sufficient, not a breach of duty. It is therefore sufficient if those responsible did not look closely enough or did not intervene.

Looking back on the last few years, is the former Chairman of the Board of Directors Urs Rohner the most exposed?

Urs Rohner must certainly bear the brunt of the debacle. As Chairman of the Board of Directors, he is mainly responsible for getting the ship through stormy times.

At the same time, **Severin Schwan** bears a great responsibility. The question is whether he was given the time to fulfill all his duties as the lead independent director and vice-Chairman of Credit Suisse in addition to his highly demanding CEO post at the pharmaceutical company Roche.

Iris Bohnet, who has been a member of the board of directors for many years, could also be targeted. **Axel Lehmann**, on the other hand, who was brought in at the end to restructure the group, is least to blame for the downfall of Credit Suisse.

Richard Meddings, Seraina Macia, Ana Paula Pessoa, Blythe Masters, and Shan Li, are five people that did not stand for re-election to the board of directors. To what extent could these individuals still be prosecuted?

For the risk of legal action, it is irrelevant whether someone resigns or no longer stands for election. The only thing that matters is who was on the board and for how long. Resignation alone is therefore no protection against a lawsuit.

Which side is most likely to sue?

To me, it is clear that the angry small shareholders who appeared at the AGM today will not sue. The structure in Switzerland is completely unsuitable for shareholder lawsuits. Firstly, in the event of a guilty verdict, the compensation goes to the company, not to the shareholders bringing the action. Secondly, the hurdles to filing a lawsuit in Switzerland are enormously high due to the possibility of enormous procedural costs.

On the other hand, I would not be surprised if large, well-funded shareholders from the Gulf region, who have suffered enormous damage, sue the company. Also likely to me is that the owners of the subordinated AT1 bonds will not put up with having \$17 billion written off in one fell swoop, even if the contracts did not exclude such intervention.

Ethos is calling on the Swiss authorities and UBS to consider a possible spin-off and listing of Credit Suisse's Swiss unit after the merger. How realistic is that?

Such a demand can indeed be made now. But before the takeover is waved through, politicians have no say. The authorities, for their part, have already approved the merger. A spin-off or IPO of the Swiss unit is therefore entirely in the hands of UBS at the moment.

Moreover, too strong demands from politicians could irritate UBS. It could then reassess the risks of the deal and, in the worst case, withdraw from the merger agreement.

Will the situation change after the merger is completed?

Yes. Once the merger has been completed, it is legally possible and not unlikely that the Competition Commission (Comco) will intervene. Between this fall and next spring, for example, it could determine that competition is not playing out properly in the corporate customer business in Switzerland.

In the event of such market abuse, Weko has strong sanctioning powers, ranging from a hefty fine to UBS to the spin-off of entire divisions of the new bank.

How shocking is it to you that shareholders' rights are being ignored?

The disenfranchisement of shareholders is very problematic. As a result, the Swiss state is one of the big losers in this bank rescue. Whether or not emergency legislation was correctly applied still needs to be meticulously investigated, especially by politicians. That is why I support the establishment of a Parliamentary Commission of Inquiry (PUK).

For emergency law to be applied, there must first be a genuine emergency and really must be no other alternative. Then emergency law must not go too far with regard to the transaction. What is disputed here is that the exchange ratio for the shareholders, and a ban on dividends have been dictated and the general meeting has been undermined.

How do you assess the role of the Financial Market Authority (Finma) in this emergency rescue?

At the moment, it is not entirely clear whether Finma intervened too late. What is certain, however, is that Finma intervened extremely strongly with the complete write-off of the AT1 bonds with the stroke of a pen. In addition, it eliminated the Competition Commission (Comco), which would never have accepted this deal.

Finma thus sweetened the deal and eliminated antitrust law. This has to be dealt with.

Does the reappraisal also have to clarify whether Finma will be given more stringent instruments for banking supervision in the future?

In my judgment, politics has kept Finma weak for years. Finma can't bite because it has no teeth. Since 2008, I have called for giving Finma power to levy fines, which is perfectly normal for foreign financial supervisors.

What would also be needed is more transparency in the various enforcement procedures. The supervised banks currently do not have to deal with public pressure. In this respect, Finma resembles a small darkroom into which a little more light should be shed.

So-called senior management regimes should also be discussed, as they have been known in the UK since 2016. This would make it easier to assign responsibilities, provided that they are implemented in a way that is easy on the bureaucracy.

On the other hand, it would be completely wrong if Finma were to be attached to the Finance Ministry. This would place supervision under the thumb of politicians. Instead, Finma must remain independent, like the Swiss National Bank, so that it does not have to take political sensitivities into account.

Peter V. Kunz is a full professor of business law and comparative law at the University of Berne, where he is the managing director of the Institute for Business Law.