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**Assessing the De Facto
Independence of Regulatory
Agencies**

The Case of the Swiss Federal Banking
Commission in the 1990s

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Assessing the De Facto Independence of Regulatory Agencies. The Case of the Swiss Federal Banking Commission in the 1990s

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Abstract

Following the development of recent empirical research, we now know a bit more regarding the diffusion of independent regulatory agencies (IRAs) in Western Europe. However, new questions are being raised, especially regarding what happens after the delegation of regulatory competencies, since we still lack information on the "real" functioning of regulatory agencies. Firstly, investigation on this topic requires a framework that allows us to assess the de facto independence of agencies. This paper suggests that this kind of independence can be assessed by paying attention to two components: (1) the degree of self-determination of the agencies' preferences and (2) the degree to which those preferences are translated into the activity of regulation.

In order to measure the first component, two aspects will be examined: the actual independence of IRAs from elected officials, and their factual relationship with regulatees. This paper presents a discussion regarding which indicators will deal with this question. The second component concerns the regulatory process, and involves a more original and complex method of assessment. The basic idea is to use information regarding participation in the most significant regulatory outputs produced by the agency in a given time-period to obtain a structure of interaction which will reveal the relative weight of actors. In order to achieve this goal, we have adopted a tool developed by Serdült and Hirschi (2004) for policy network comparison that generates clear and comparable data about the decision-making process. Such a model produces results, which are in line with classic social network analysis applications. This way, we should be able to highlight the degree of centrality of the relevant actors in the process of production of rules.

Furthermore, this paper illustrates the aforementioned approach with the example of the Swiss Federal Banking Commission. Evidence from this case shows that actors others than the political decision makers - namely the regulatees - are also relevant, therefore enquiries on the functioning of IRAs need a relational profile. The empirical results show that the regulatees and the political decision makers affect only moderately the preferences of the SFBC; nevertheless the regulatees remain especially important in the enforcement of the new regulatory framework.

Keywords : IRA, independence, banking, implementation, Switzerland

Résumé

Au cours des dernières années, on a assisté au développement d'une importante littérature scientifique sur la diffusion des autorités administratives indépendantes (AAI) en Europe occidentale. Cependant, aujourd'hui de nouvelles questions apparaissent à propos de la délégation de compétences de régulation et du fonctionnement "réel" des AAI. Il s'agit tout d'abord d'établir un cadre heuristique et méthodologique pour concevoir et mesurer l'indépendance "réelle" des agences. Pour opérationnaliser cette démarche, nous proposons une distinction analytique entre deux composantes qui permettent de rendre compte de cette notion: (1) l'autoréférentialité des préférences des AAI et (2) l'intégration de ces préférences dans le processus de régulation.

Pour mesurer la première composante, j'examinerais deux aspects: l'indépendance factuelle des AAI par rapport aux décideurs politiques, et les relations qu'elles développent avec les "régulés". Ce papier présente une série d'indicateurs pour rendre compte de ces connexions. La deuxième composante concerne le processus de régulation, et implique une méthode plus originale et complexe. Il s'agira d'utiliser les informations sur la participation aux processus de décision de l'agence dans une période donnée, de manière à obtenir une structure d'interaction qui révèle le poids relatif des acteurs. Pour atteindre ce but, nous avons adopté un outil développé par Serdült et Hirschi (2004) sur la comparaison des réseaux de politiques publiques, qui génère des données claires et comparables, en phase avec les applications classiques de l'analyse des réseaux sociaux. Ainsi, nous devrions être capable de mettre en évidence le degré de centralité des acteurs pertinents dans les décisions de régulation de l'autorité en question.

En outre, ce papier illustre cette approche à travers l'exemple de la Commission fédérale des Banques Suisse (CFB). Les résultats montrent que des acteurs autres que les décideurs politiques – en particulier, les "régulés" – sont aussi importants, ce qui souligne l'importance du "profil relationnel" de l'activité des AAI. Les résultats empiriques montrent que les "régulés" et les décideurs politiques influencent seulement modérément les préférences de la CFB; cependant, les premiers restent particulièrement importants dans la mise en oeuvre du nouveau cadre de régulation.

Mots-clefs : AAI, indépendance, banques, mise en oeuvre, Suisse

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Introduction

The recent years have produced a growing body of literature about the institutionalisation of a new regulatory order - identified with the concept of regulatory state (Majone 1994), or, more broadly, regulatory capitalism (Levi-Faur 2005; Levi-Faur and Jordana 2005). These works argued that the mode of governance in western countries has considerably been revolutionised in the last two decades. This approach is built on the empirical observation that as of the 1980s, the post-war settlements of "welfare capitalism" have been severely challenged (Coen and Thatcher 2005), but in an unexpected way. While several studies emphasise how the spread of liberalisation and privatisation is hollowing out the State by restricting the room for political manoeuvre, and other scholars point out the increase of deregulation, this approach underlines also the expansion and intensification of more strict and formalized regulatory arrangements (Levi-Faur 2005). Indeed, a consistent phenomenon of creation of new rules is widely detected, whose competencies of execution are delegated to non-majoritarian regulators (Coen and Thatcher 2005), and especially to independent regulatory agencies (hereafter IRAs), that are agencies enjoying - at least partly - formal independence from political control. Since the 1980s, in western Europe, this institutional model has been extensively adopted in almost all regulatory fields, and, where older agencies were already established, their competencies and their formal independence have both been improved (Gilardi 2002; Gilardi 2005b).

Scholars have been interested in explaining the worldwide proliferation of IRAs, following a similar trend in just about all regulatory domains. We consequently now know a bit more regarding the origin and diffusion of independent regulatory agencies (Gilardi 2005a). There is now cumulative evidence showing that the spread of IRA is due to a mix of factors concerning mechanism of emulation among countries, top-down initiatives - above all European Union policies -, and functional pressures for improving credibility of national policies and coping with political uncertainty (Gilardi 2005b).

Today, however, new questions are being raised, especially regarding what happens after the implementation of the regulatory capitalism, that is, after the delegation of regulatory competencies, since we still lack information on the functioning of IRAs.

I shall start this paper by discussing the theoretical problem of interpreting the implementation of the regulatory capitalism, and shall offer an appropriate heuristic and methodological framework. I shall argue that, in order to study the relevance of the new regulatory framework, it is worthwhile investigating how the new rules are implemented, by measuring the "real" independence of the IRA in charge.

Then, as an application of my approach, I shall describe the transformation of the regulatory framework of the Swiss financial sector - from an asymmetric corporatist system based on self-regulation to a more formalised regulatory order - following the new federal acts, which provided a tough enforcement of formal competencies of the Swiss Federal Banking Commission.

I shall then present the results of the empirical analysis. I shall conclude with a synthesis and some expectations for further research.

The “real” independence of an IRA

We pointed out in the previous section that significant growth of regulations worldwide. The supervision and sanctioning competencies have been increasingly delegated to IRAs, thus introducing a more formalised and rigid regulatory order.

This now raises the question of how to interpret these developments. The aim of this paper is to build a heuristic framework, so as to gain knowledge of what happens after the delegation of regulatory competencies. This framework will be useful to test whether the implementation of the new regulations actually implies the transition from the traditional regulatory order to a new mode of regulation according to the characteristics of the regulatory capitalism (Levi-Faur 2005). To this effect, we must study the “real” independence of the IRA. It is indeed my argument that “real” independence, as the primal attribute of IRAs, represents the magnifying glass to examine their functioning. Therefore, the question that will constitute the *fil rouge* of this article is the following. Is the IRA - in charge of implementing new regulations - truly independent?

A few empirical studies have recently been led regarding formal independence (Gilardi 2005a). There are however arguments according to which we can expect that “real” independence could be different from the formal one. Indeed, we contend that formal rules only portray one part of the functioning of an agency (Thatcher 2002a; Thatcher 2002b). An exclusively formal approach is misleading in at least two crucial features: the discretion allowed by the institutional framework (Friedberg 1997; March and Simon 1958); and the effects of the relationships - less formalised - with other actors than the decision makers, namely the regulatees, that possibly will affect the behaviour of IRAs (Stern 1997; Thatcher 2002b; Wilks and Bartle 2002).

First of all, it is worthwhile defining the “real” independence of an IRA. In his seminal paper, Majone (Majone 1997) identified IRAs as “(...) highly specialised organisations enjoying considerable autonomy in decision-making”. According to Verhoest and his colleagues (Verhoest, Peters, Bouckaert and Verschuere 2004), we have to include another dimension in this definition: the exemption of constraints throughout the use of those competencies. With this (dual) definition in mind, we will use the term of “de facto independence” to understand the notion of “real” independence in a rather simple manner, namely the autonomy of an agency in shaping the application of the regulation on a target sector. On the contrary, we have a reduction of “real” independence if the action of an IRA is biased by other actors. We now have to make this notion operational. We propose an analytical distinction between two theoretical components of de facto independence: the self-determination of preferences and the integration of these preferences into the regulatory process. Taking this distinction seriously means, first of all, (1) establishing what determines the preferences of an agency. Then, (2) discussing how the activity of regulation - that is, the production of regulatory outputs - incorporates these preferences (see table 1 below).

Table 1: *Heuristic scheme of the de facto independence of an IRA*

Theoretical Components	1) Self-determination of preferences	2) Translation of the preferences into the activity of regulation
Empirically Observable Dimensions	(1.1) Relationship between the IRA and the political decision makers, and (1.2) relationship between the IRA and the regulatees	Influence of (2.1) the political decision makers and (2.2) the regulatees on the regulatory outputs

1. The self-determination of preferences

To be de facto independent means at first that the preferences of the agency under investigation are self-determined. In other words, agencies are fully independent if their actions follow their organisational dynamic, however shaped by their proper mandate¹. In fact, the Public Choice School (Buchanan, Tullock and Rowley 2004) has shown quite clearly that every bureaucracy has a propensity to develop an internal logic, which is inseparable from its official goals. On the other hand, we have a reduction of independence if the agency's preferences are hetero-determined, that is, predefined by others - external - actors. This is the case if the preferences of an agency do a priori integrate the fundamental interests of another individual or corporate actor (beyond the official mandate). Since we conceptualise an IRA as an intermediary agency (Braun 1993), the relevant external actors are the political decision makers and the regulatees (the representatives of the regulation's target sector). Therefore, we have to open the black box in order to measure how much the preferences of the IRA are biased by these actors². To do so, we shall focus on three facets characterising both the relationship between the IRA and the political decision makers and the relationship between the IRA and the regulatees, namely the two empirically observable dimensions of the first theoretical component - the self-determination of preferences - of de facto independence. These facets are: (1) autonomy of employees, (2) of resources, (3) of board members. Every facet then contains two indicators that will be discussed in the following section.

¹ The distinction between the organisational dynamic and the proper mandate represents a puzzle that we chose not to deal with now, admitting with Friedberg (Friedberg 1997) that they are irremediably entrenched. For further discussions on this topic see the work of sociologists of organisations (Crozier and Friedberg 1981; March and Simon 1958).

² For a discussion of the problem related to a lack of independence from the political decision makers, see for example (Alesina and Summers 1993; Cukierman, Webb and Neyapti 1992; Kydland and Prescott 1977; Moe 1984; Moe 1985). A discussion regarding nuisances related to a scarce autonomy from the regulatees is developed in the capture theory (Stigler 1971).

A qualitative inquiry about the degree of self-determination of the preferences of agencies

The aim of this section is to locate some indicators allowing us to investigate the nature of the relationship between an IRA and the political decision makers, and between an IRA and the regulatees. The analysis of these relations is crucial to find out to which extent others actors are able to influence the preferences of an agency. It ought to be possible to establish several indicators for both of these dimensions. For this purpose, I was inspired by previous research about informal aspects of independence, especially from literature on central banks (Bade and Parkin 1982; Cukierman et al. 1992; Grilli, Masciandro and Tabellini 1991); delegation to IRAs (Thatcher 2002b); public policy (Papadopoulos 1995); courts of justice (Breton and Frascini 2003), capture theory (Stigler 1971), corporate governance (IOSCO 2002; OCDE 2004).

Concretely, I split the first dimension into three facets - qualifying the character of the relationship between the IRA and the political decision makers. The first facet concerns indicators of (low) employees' autonomy: the frequency of revolving door; and the frequency of *ad hoc* contacts, such as internships, collaborations for exchanging expertise or regular meetings with public officials. Indeed, the capture literature does suggest that the professional characteristics of regulators are important, because revolving door will predict a scarce autonomy (Thatcher 2002b). In addition, we consider here that the need for external expertise gradually diminishes the autonomy of the actor under investigation, i.e. the IRA (Papadopoulos 1995; Peters 2001). The second facet, about autonomy of resources, allows us to underline the reduction of autonomy in case of use of discretion in budget setting and in case of control over internal organization by the political decision makers (Thatcher 2002b). The autonomy from the funding sources (public, business sector, mixed) is then evaluated in connection with these two aspects. The third facet involves the autonomy of the members of the board, and firstly the weight of partisan membership on nominations. We consider that the magnitude of this indicator, representing a poor independence, is moderated by the balance of power and the heterogeneity of members (Breton and Frascini 2003). The second indicator of this facet concerns the political vulnerability of the IRA (Bade and Parkin 1982; Cukierman et al. 1992; Grilli et al. 1991). This is related: on the one hand, to the correlation between the substitution rate of the head of the IRA and the incidence of political changes, such as the election of a new government; on the other, to early departures of board members (Thatcher 2002b), demonstrating both scarce autonomy.

Next, pertaining to the relationship between the IRA and the regulatees, we are able to identify another three facets. The indicators used for studying the former relationship are, after some simple necessary adjustments, once again useful in regards to the first two facets. Then, the third facet relates to the autonomy of the board, taking into consideration firstly the closeness of the current professional activity of board member as regards to the regulatees, once again moderated by balance of powers and heterogeneity; and secondly the proximity of the former profession of board members, pondering by possible personal or business relations, episodes of corruption or intimidation (IOSCO 2002; OCDE 2004). The selected indicators are summarised in table 2.

Table 2 : Indicators of self-determination of preferences of the IRA

Dimensions	Facets	Indicators of <i>de facto</i> independence
(1) Relationship IRA- Political Decision Makers	1. Autonomy of employees	1. Frequency of revolving door 2. Frequency of <i>ad hoc</i> contacts (internships, exchanges of expertise, regular meetings)
	2. Autonomy of resources	3. Sources and discretion in budget setting 4. Sources and discretion in organisation setting
	3. Autonomy of the members of the board	5. Weight of partisan membership on board members nominations, moderated by balance of powers and heterogeneity 6. Political vulnerability (earlier departures of IRA head and board members)
(2) Relationship IRA- Regulatees	1. Autonomy of employees	7. Frequency of revolving door 8. Frequency of <i>ad hoc</i> contacts (internships, exchanges of expertise, regular meetings)
	2. Autonomy of resources	9. Sources and relative adequacy of budget resources 10. Sources and relative adequacy of organisation resources
	3. Autonomy of the members of the board	11. Closeness of the professional activity of board members, moderated by balance of powers and heterogeneity 12. Former profession of board members (pondering with possible affair relations, episodes of corruption or intimidation)

From this point on, indicators in the empirical analysis will be qualitatively aggregated in order to assign a value to every facet according to its autonomy, ranging from very low to very high: (1) ---, (2) --, (3) -, (4) +-, (5) +, (6) ++, (7) ++++. We shall then associate to each one of the two dimensions a score that represents the arithmetical average of the value attributed to the three facets. It is then possible to also calculate, in the same way, the final score (of the first component) of the *de facto* independence, but I think that this measure will cause the loss of too much information, with no analytical usefulness for the present inquiry. It is therefore preferable to picture the self-determination of preferences of an agency as a two-dimensional space with two axes: the relationship with the political decision makers and the one with the regulatees.

2. The translation of preferences into the activity of regulation

I claim that the second component of the *de facto* independence of an agency is the ability to translate its preferences into the activity of regulation, i.e. in regulatory texts (directives, resolutions and so on) and then in single decisions (sanctions etc.). Conversely, we have a reduction of autonomy if external actors,

once the agency's preferences established, can manipulate however crucially the activity of regulation, in order to override the will of the relatable IRA³. In other words, we now consider the agency as a black box and we shall then try to see if other actors can exogenously sway the regulatory process. To do this, our aspiration would have been to directly measure the agency's independence during the pure activity of regulation, that is through the procedures of controlling and sanctioning carried out on the target sector. Nevertheless, it seems that there is neither empirical feasibility (it is impracticable to highlight the informal pressures concerning a single decision exerted by the political decision makers or by the regulatees, because no suitable trace of it exists) nor theoretical basis (how do we establish what is influencing a specific decision, or, even more notably, a non-decision?) regarding this approach.

The solution I suggest is to proceed in a slightly more indirect manner. We do indeed claim that the best way to assess the independence of the activity of regulation performed by an agency - after having established its level of self-determination of preferences - is to see how much the preferences of that agency or other actors are integrated in the main regulatory outputs, that is the compulsory regulations formulated by the agency (see table 1). In other words, in order to examine the degree of influence of every pertinent actor, we must focus on the inner political cycle of the IRA, related to the production of rules.

A network process analysis of regulatory outputs

In order to continue discovering what shapes the regulation of the target sector, we have decided to study the production of rules by the IRA in charge. As proposed by Genoud (Genoud 2002), we adopt the social network analysis (SNA) method. Our application of it is however somewhat original; we shall focus on the extent to which the various actors affect the regulatory texts prepared by the agency during the investigated period, through the study of the participation in the internal decision making process. The aim of this approach is to provide parsimony, clarity and comparability within the results, which is rather difficult when coping with process data. It is however obvious that we must use a strong assumption: that participation means influence⁴. But we will momentarily accept this drawback before suggesting a refinement of theoretical foundations of our assumptions⁵. We shall then use a basic exploitation of the striking method developed by Serdült and his colleagues (Serdült and Hirschi 2004; Serdült, Hirschi and Vögeli 2004), allowing to transform process information into structure data.

Following this method, the first step is the creation of an actor-process-event scheme (APES). Information from case studies can be transformed into an APES, where actors interact through event participation and procedural links. Concretely, the APES is a two-dimensional graph, which links the participating actors with the chronological sequences of the political process under investigation (see the appendix for an illustration). In the actor axis, we focus on participating corporate actors (Coleman 1973). In the process axis, we need to select the crucial events that make up one or more stages of a policy cycle (Howlett and Ramesh 2003), in this case the inner policy cycle of the IRA under examination. The definition of these events depends on the parameters of the

³ Incidentally, for a similar argument, see the economists of regulation discussing the capture problem (Martimort 1999; Pelzman, Levine and Noll 1989; Stigler 1971).

⁴ The connection between actors' location and their influence is acknowledged by several scholars interested in SNA (Diani 2003; Knoke 1990).

⁵ For example we can enhance the refinement of this method by distinguishing between actors that are actively participating and those that are only passively involved.

political system and on the peculiar characteristic of the process under investigation. We could distinguish at a later stage whether an actor participates in an event or not, and see if it does so together with others. Furthermore, we can follow the course of the policy process and notice the procedural linkages between the actors in charge of the object⁶.

The second step is the transformation of the APES into a policy network. The APES gives us information allowing us to create two data matrix: the first containing data about event participation (two mode actor-event matrix), the second containing data about the procedural links (one mode actor-actor matrix). The first matrix is built by filling the cells with the value of a one (1), if an actor participated in an event, or with a zero (0), in case an actor did not participate. We then have to transform this matrix in an actor-actor one, with the adequate procedure in UCINET (Borgatti, Everett and Freeman 2002), to obtain the symmetric relations between all pairs of actors. The second matrix is simply created by filling the cells with the sum of all process links, where a single process links has a value of one (1). Finally, following the suggestions of the authors (Serdült and Hirschi 2004; Serdült et al. 2004), the multiplication - element by element - of the two matrix is supposed to represent the policy network derived by procedural data.

We then have a matrix which provides parsimonious, clear and - last but not least comparable data that we can analyze using the classical Social Network Analysis tools. In other words, as mentioned by Serdült, Hirschi and Vögeli (2004), we are able to compare the decision-making processes according to some network properties, such as measurements of density and centrality. In this paper we will calculate and then compare the Freeman's centrality degrees of participating actors, with the aim of discovering which are the most important ones, by dividing the range of values into seven ordinal categories, from very low to very high. We assume that the most central actors are very prominent in the production of rules, hence crucially influencing the activity of the IRA. Finally, we notice that these sorts of data are also congruent, in heuristic foundations and in methodology, with recent comparative methods such as QCA and fuzzy sets (Ragin 2000).

3. Data sources and research techniques

There are two appropriate sources of information: written documentation and information given by relevant actors themselves, based on interviews or survey inquiries. The main useful source of information to build the first component is survey inquiry, with the exception of data that is definitively more clearly located in primary written sources. Then, in order to focus on a specific point, we can continue with a modest amount of interviews. Regarding the second component, one of the most important categories of evidence, according to Serdült and al., comes from analysis of written documentation about specific events (such as protocols, negotiations reports, etc.), from governmental and non-governmental sources. This data is then completed with some interviews with the representatives of participating actors for details.

⁶ Please note that, due to lack of relevance for the heuristic and descriptive purposes of this paper, we shall not analyse the APES at this time, but shall exploit it in order to transform process data into structural data.

The case of the Swiss financial sector : From the primacy of self-regulation to regulatory capitalism

I argue that the re-regulation of the Swiss financial sector represents a relevant case study through which to investigate the implementation of the new regulatory framework, because it shows some peculiar and interesting features. In line with the more general developments of the 1990s, we observe the setting up of three new pieces of legislation regulating the Swiss financial sector, whose competencies are delegated to a pre-existing IRA, the Swiss Federal Banking Commission (SFBC). We consider that the implementation should be in this case particularly consistent. One might indeed expect, from a theoretical point of view, that the phenomenon of re-regulation, in this case, comes following functional pressures, because, firstly (even if beforehand no regulation concerning these domains existed), the SFBC has formally existed for many decades, lowering the likelihood of mere institutional emulation. Secondly, since Switzerland is not an EU member, the top-down pressures should be also lower. Moreover, the sector under investigation is very prominent for Switzerland and it is intensively internationalised, thus conclusions will be empirically interesting. Finally, because of a reform project under discussion at the time this article was written, this research may contribute to the debate about the nature of a new IRA.

To begin with, we notice that the Swiss regulatory framework concerning the banking and financial sector is traditionally based on two main pillars (Zufferey 1998): (1) the practices and norms of self-regulation; (2) the Federal Banking Act of 1934 (BA) with its implementing provisions.

The self-regulation, which has a long history, played and continues to play a significant role in the practice of the Swiss financial regulatory framework (Bänziger 1986). In particular, the banks, through peak associations - especially the Swiss Bankers Association (SBA) - used to stipulate a series of standards, known as "deontological", to prescribe the requirements to which their management must conform. Conversely, the Swiss Federal Banking Commission (SFBC) is the actor in charge of ensuring the respect of public law that emanates from the Banking Act. It is worthwhile to note that the Swiss legislation, supporting only minimal and very general principles, used to be strongly criticised by several governments and international organisations even until at the early 1990s.

This description reveals the essential features characterising the traditional regulatory framework of the Swiss financial sector, showing the priority granted to the solutions prepared by the private actors themselves, who are in favour of the self-regulation coupled with very light public regulation (Nobel 1998), according to a logic of "private interest government" (Schmitter and Streeck 1985).

However, the need for the development of a new legal framework in line with the increasing openness of the financial markets, which would substitute the Swiss financial sector's self-regulation, became clear in the late 1980s. In this context, three new laws came into effect, thus considerably expanding the competencies of the Swiss Federal Banking Commission (SFBC). One can concretely pinpoint three new Federal Acts (and then three ordinances of the SFBC) that constitute the core of the new regulation of the Swiss financial sector achieved by the SFBC (see table 3).

Table 3: The new regulatory framework of the Swiss financial sector

New Federal Acts	New Ordinances Of The SFBC
Federal Act on Securities Exchanges and Securities Trading (SA) of 24 March 1995.	⇒ Ordinance of the SFBC on Securities Exchanges and Securities Trading (SFBC-SO) of 25 June 1997
Federal Act on Investment Funds (IFA) of 18 March 1994 (complete reform).	⇒ Ordinance of the SFBC on Investment Funds (SFBC -IFO) of 24 January 2001
Federal Money Laundering Act of 10 October 1997 (MLA).	⇒ Ordinance of the SFBC concerning the prevention of Money Laundering (SFBC-MLO) of 18 December 2002

Can one read this as a transformation of the mode of regulation of the financial sector, replacing the traditional corporatist system with a rule-based, formalized and transparent model, relying on delegation to IRAs, subjected to competition and shareholders-oriented, which would illustrate an institutional convergence towards the model of regulatory capitalism (Levi-Faur 2005)? In other words, does such a regulatory expansion indicate the rise of a new (Anglo-Saxon-style) regulatory order?

First of all, it is crucial to determine if the content of the new rules is relevant, that is, if they have entailed a change of paradigm in the way the regulation of the target sector is defined by the political decision makers. More precisely, we now have to decide if this broadening of the legislation has led to a major policy change in the new regulatory framework (Sabatier 1999), introducing a "third order change", which involves substantial modifications in instruments and in goals behind policy (Hall 1993).

On the one hand, the decision makers' traditional approach to the financial sector involved delegating to business representatives by giving priority to private solutions. Nowadays, on the other hand, the main policy instrument is the IRA's regulation activity. The SFBC's competencies - which remained unchanged for several decades and which were quite modest - have benefited from a huge progression. Concretely, the SFBC is brought to widen its glance towards many additional activities on the financial markets, which were not subjected at all to regulation, i.e. the task of supervision: securities traders; investment funds; securities exchanges and capital markets; and acquisitions, fusions and competition⁷.

On the other hand, regarding official goals, we can observe a progressive shift from protectionism to a more transparent and competition-oriented paradigm. All three new acts show a predominant orientation to international cooperation and transparency, in order to be in accordance with international and European standards⁸. In particular, the Securities Act - even if the federal Council was

⁷ La place financière suisse, DFF-DFAE, juin 2003.

⁸ Sources : Verfügung ueber die Einsetzung der Studiengruppe ueber das Boersenwesen, Eidg.Finanzdepartement, Bern, 10 August 1988 ; Protokolle der Expertengruppe für die Ausarbeitung eines Bundesgesetzes über den Effektenhandel, Eidg. Finanzdepartement, Bern, 1990; Bundesgesetz über die Börsen und den Effektenhandel. L'avenir de la place financière suisse, rapport du groupe de travail place financière suisse des partis représentés au Conseil fédéral, 20 décembre 1989 ; Loi sur les fonds de placement, Commentaire de l'avant-projet de la Commission d'experts, décembre 1991. Loifédérale relative à la lutte contre le blanchissage d'argent, explications de l'avant-projet du groupe

forced to strongly moderate its requests after the consultation procedure and the parliamentary debate - introduces the ground-breaking notion that the securities exchange does not concern only the private domain, but that it also needs public regulation⁹. The Investment Funds Act then institutes the priority principle for shareholders and investors protection even if it is at the same time limiting the public intervention to the minimum¹⁰. Finally, concerning the Money Laundering Act, a big effort was needed to find an agreement, because some private actors were completely opposed to a new federal act, so the draft was severely contested¹¹. The decision makers thus were forced to moderate their proposals, in particular by partially maintaining a coexisting system of self-regulation. Nevertheless, the federal authorities were successful in imposing a new key feature, that is, the general obligation of communicating of every relevant suspicion of money laundering¹².

To sum up, the contents of the new pieces of legislation, while not revolutionary, are clearly innovative, and in line with regulatory capitalism. Then, the formal characteristics of regulatory capitalism are imposing, although in a minimal and quite incomplete way. In other words, the regulation of the financial sector is slowly shifting from the traditional settlements, namely a corporatist system based on the primacy of self-regulation - into a more regulated, formalized, transparent (Lütz 2000) paradigm, whose competencies of execution are increasingly delegated to an IRA (the SFBC). Incidentally, it is worthwhile noting that our analysis is consistent on this point with the empirical work of Mach, David and their collaborators, who underline dynamics of re-regulation of certain sectors of the Swiss economy, according with the consequences of a progressive and selective liberalisation of markets (Mach, Schnyder, David and Lüpold 2006).

The point now is just how the new regulation is implemented. I argue that the key for undertaking the study of the implementation of this regulatory framework is the de facto independence of the IRA in charge of applying the new rules. As we said above, this kind of independence can be analysed through two dimensions: the self-determination of preferences and the autonomy of the activity of regulation.

Results and discussion

Hereafter we present the application of the aforementioned approach to the study of the de facto independence of the Swiss Federal Banking Commission, during the 1990s.

de travail interdépartemental, janvier 1994.

⁹ Message concernant une loi fédérale sur les bourses et le commerce des valeurs mobilières du 23 février 1993, Feuille Fédérale (93.025), 1 (17); Bericht über die Vernehmlassungsergebnisse, Eidg. Finanzdepartement, Bern, 22 Januar 1992; Bulletins officiels de l'Assemblée fédérale (...).

¹⁰ Message concernant la révision de la loi fédérale sur les fonds de placement du 14 décembre 1992, Feuille Fédérale (92.082), 1 (7) ; Anlagefondsgesetz, Protokolle der Sitzung, Nationalrat, Kommission für Rechtsfragen (...); Loi sur les fonds de placement, PV des séances, Conseil des Etats, Commission des affaires juridiques (...).

¹¹ Message relatif à la loi fédérale concernant la lutte contre le blanchissage d'argent dans le secteur financier du 17 juin 1996, Feuille Fédérale (96.055), 3 (37).

¹² Protokolle der Sitzung, Nationalrat, Kommission für Wirtschaft und Abgaben (...); Bundesgesetz über die Börsen und den Effektenhandel, Protokolle der Sitzung, Ständerat, Kommission für Wirtschaft und Abgaben (...).

Note that data sources are: surveys addressed to the SFBC, to the SBA, and to public officials; six semi-directed interviews with SFBC executives, civil servants and ASB members; SFBC annual reports.

1. The first component of independence

In this section we shall try to assess just how much the decision makers (administration and government) on the one hand, and the regulatees - via the Swiss Bankers Association (SBA) - on the other, are capable of predetermining the preferences of the Swiss Federal Banking Commission.

We start with (1) the study of the relationship with the political decision makers. The first facet is about employees' autonomy, which is medium. Evidence shows, in fact, that revolving doors is not very frequent¹³. On the other hand, the collaboration for expertise is quite intense, as a process of cooperation regarding the preparation and the interpretation of the legislation, coupled with several regular all-purpose meetings¹⁴. Moreover, meetings or internships are rather frequent. The next facet concerns the autonomy of resources. Budget decisions are partly regarded as administrative competencies, but the spending remains under IRA control. Moreover, the SFBC enjoys important discretion in organisational choices¹⁵. We however note that in the period under investigation, the SFBC was continuously soliciting more resources and more independence, asking for an increase in remunerations, too¹⁶. We consider therefore that resources autonomy is medium in this case. Concerning the third facet (the autonomy of the board members), some actors said that partisan membership has no effect, other that it does, but a very mild one¹⁷. All in all, we finally realised that the board is quite heterogeneous and there is a real balance of power between the board members¹⁸. Moreover, board vulnerability is clearly weak. In fact we observe a great stability of the head position over time, replaced only due to age limits¹⁹. Furthermore, even if we notice a few earlier departures of members, these cases are almost all regarded as voluntary transfers to the private sector due to better financial conditions²⁰. At the end of the day, we consider that autonomy here is high.

We now move on to (2) the relationship with the representatives of regulatees. First, we consider that employees' level of autonomy is quite low. The revolving door is fairly frequent in both directions, especially since the 1990s; in particular several employees moved to the private sector²¹. Furthermore, the collaboration for expertise purposes is indeed common and recurrent, due in particular to the workgroups that set up the regulatory texts' outlines²². The second facet's degree of autonomy, involving autonomy of resources, is quite high. For instance, the SFBC collects taxes from banks and other institutions, contributions that are fixed beforehand by the law, according to the costs engendered the

¹³ Survey addressed to the SFBC, 30 March 2005.

¹⁴ Survey addressed to the SFBC, 30 March 2005; Survey addressed to the administration, 12 April 2005.

¹⁵ Survey addressed to the SFBC, 30 March 2005.

¹⁶ EBK Jahresbericht 1992 ; *ibid.* 1993 ; *ibid.* 1996 ; *ibid.* 1997 ; *ibid.* 1998 ; *ibid.* 1999.

¹⁷ Survey addressed to the SFBC, 30 March 2005; Interview with a civil servant, 16 April 2005.

¹⁸ Survey addressed to the SFBC, 30 March 2005.

¹⁹ See the SFBC flow charts, from 1992 to 1999, into the annual reports cited before.

²⁰ EBK Jahresbericht 1998.

²¹ Survey addressed to the SFBC, 30 March 2005; EBK Jahresbericht 1998 ; *ibid.* 1999.

²² Survey addressed to the SBA, 11 April 2005; EBK Jahresbericht 1992; Interview with a SBA executive, 24 May 2004.

preceding year²³. Therefore, the regulatees have direct influence neither on budget nor on organisational decisions; nevertheless, during the 1990s the SFBC constantly blamed a lack of resources²⁴. We finish with the question of the autonomy of the board members. Members, with the exception of the president (at this time, the former director of the secretariat), are not hired full-time. They normally have a professional activity as professors, lawyers, entrepreneurs, or are - less frequently - former bankers²⁵. A consistent quota of these persons sat in one or more company boards that are not submitted to supervision, in accordance with the restrictions prescribed by the Banks Act. In addition, it is not rare that before their nomination or after their departure, SFBC members enjoy a place in the executive board of a bank or a financial company. Since these developments are quite conventional, we conclude that the autonomy is here medium. Incidentally, we note that there is no evidence of corruption or of intimidation (Hafner 2003).

We can now calculate the mean value for every relationship describing the first component of de facto independence. In conclusion, concerning the self-determination of preferences, the SFBC has a quite high independence level from political decision makers; and a medium independence level from the regulatees (see table 4).

Table 4: Results about the self-determination of preferences of the SFBC

Dimension	Facet	Independence	Average by dimension
Independence from the political decision makers	1	+-	
	2	+-	+
	3	++	
Independence from the regulatees	1	-	
	2	+	+-
	3	+-	

2. The second component of independence

We shall now discuss the actors' capability of inserting their preferences into the regulatory outputs. We first have to choose the most important rules produced by the IRA in charge from the early 1990s to the early 2000s. In this time period, we observe that, as a consequence of the remarkable widening of its competencies, the SFBC worked out three important ordinances (i.e. implementation acts): the ordinance on Stock Exchange of 1997 (SFBC-SO); the ordinance on Investment Funds of 2001 (SFBC-IFO); the ordinance against Money Laundering of 2002 (SFBC-MLO). Second, we decide to focus on every actor who took part in the decision making process, on the basis of both theoretical literature and existing documentation about the specifics cases (see the appendix for the full list of participating actors and acronyms). The third step is the partition of the process into a series of crucial events, according to the

²³ See Müller (Müller 1997)

²⁴ Survey addressed to the SFBC, 30 March 2005.

²⁵ Note however that in more recent years - after the period under investigation - we are observing a significant increase of board membership attributed to (former) bankers.

policy cycle theory (Howlett and Ramesh 2003). We adopted a somewhat inductive line of attack, starting with a classical sequential approach (Jones 1977; Lasswell 1956). These general findings are then put into practice thanks to a classical Swiss decision making process scheme (Kriesi 1995; Sciarini 2002). Concretely, the outline is based on the legal literature (Müller 1997) and on archive documents concerning the ordinances; our reading of the story is improved by the information given by the actors themselves in six semi-directed interviews. In conclusion, the inherent sequence of events is as follows: (1) preliminary investigations; (2) draft preparation; (3) consultations; (4) decision; (5) monitoring (the corresponding APES are presented in the appendix).

We are able now to display the results. All the networks present quite a pluralist participation: almost all the relevant actors are included in the process. In fact, the overall density is quite high. However, we can already distinguish a recurrent structure, common throughout all the networks, where the ties are stronger, namely a central dyad composed by the Federal Swiss Banking Commission and the Swiss Bankers Association, to which we must add the most concerned actors for every subject discussed. For example, the SWX Stock Exchange in the case of the Ordinance on Stock Exchanges (see figure 1), and the Swiss Funds Association in the case of the Ordinance on Investment Funds (see figure 2). Note that the administrative actors are nearly completely irrelevant, except for the Ordinance against Money Laundering (see figure 3).

The application of the tools of Social Networks Analysis allows us to go further still (the matrices and the calculations are in the appendix). First, we can calculate the Freeman's centrality degree, in other words, the (local) popularity of participating actors (Scott 2000).

On the basis of our results, we can classify every actor from the least to the most central, assigning an ordinal value (see table 5). We subsequently observe that the Swiss Federal Banking Commission - not really surprisingly, because of its procedural relevance - is the most central actor. Then come the Swiss Bankers Association, the Accountants Chamber, and the Swiss Funds Association; the Swiss National Bank is only in the fifth place, together with the Audit and Rating Companies, with a fairly poor score in the Ordinance against Money Laundering. Finally, the administrative offices - namely the Authority against Money Laundering of the federal Department of Finance and the Bureau on Money Laundering of the federal Department of Justice and Police - possess a low centrality level. This means that the Swiss Bankers Association highly influences the production of rules, hence the independence of the Swiss Federal Banking Commission from the SBA concerning the activity of regulation is low. On the other hand, the centrality of State officials is on average weak, thus the relative independence of the Swiss Federal Banking Commission is here high.

Figure 1:
SO - SFBC

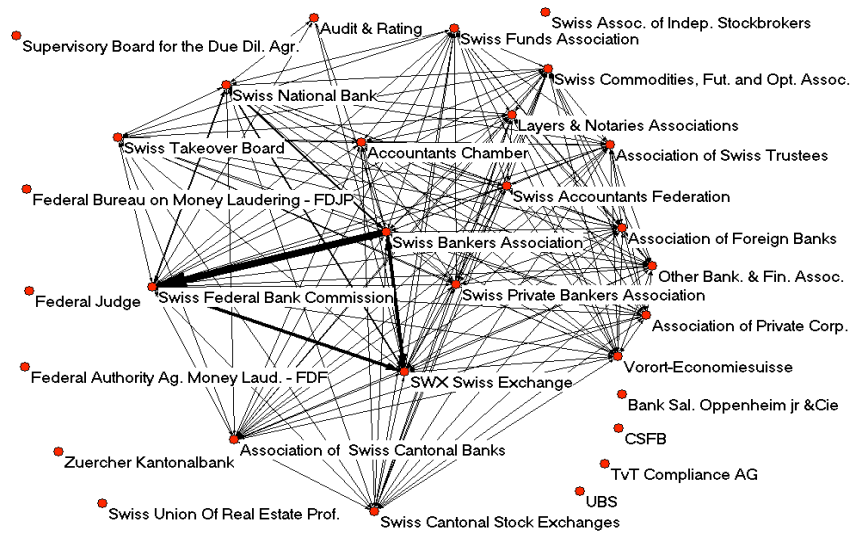


Figure 2:
IFO - SFBC

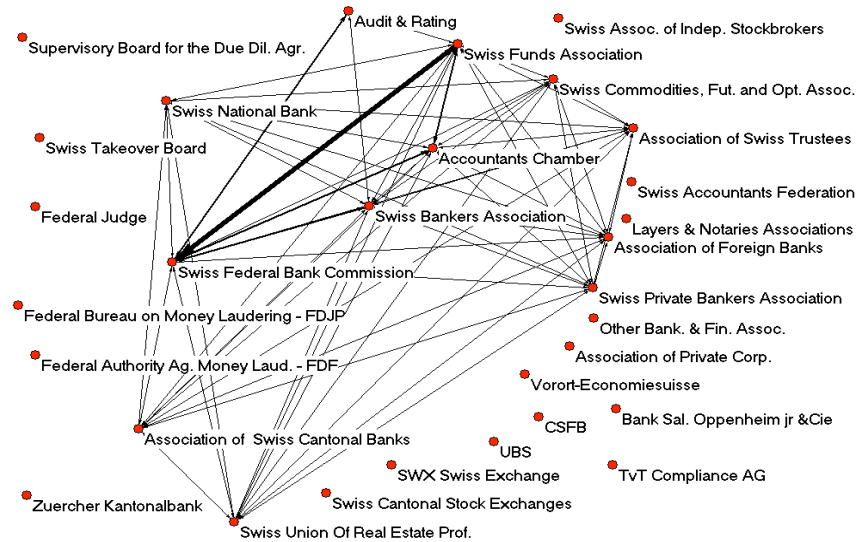
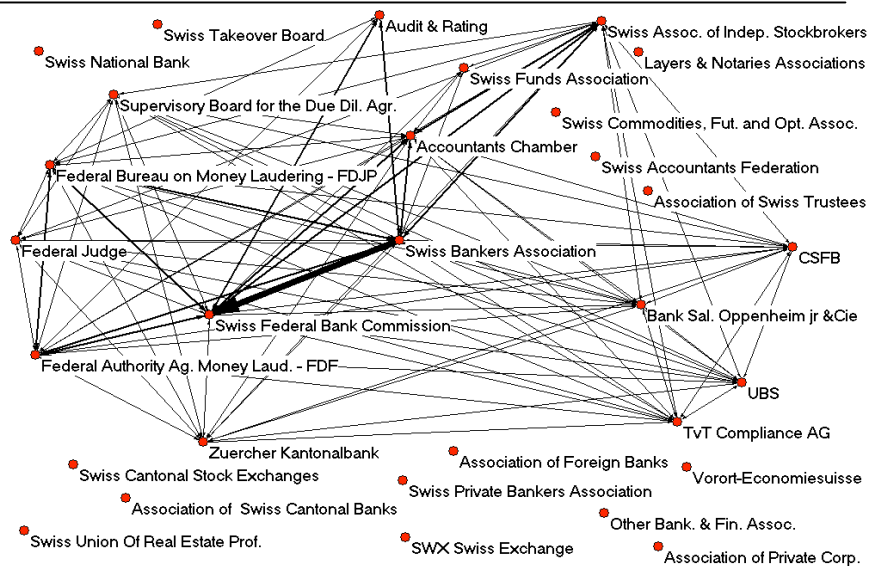


Figure 3:
MLO - SFBC



These findings are in general not very astonishing, because it is normal that an IRA cannot be completely independent in the activity of regulation. Nevertheless, it is important to observe from which actors an agency is more or less autonomous, and how deep the various actors are integrated in the regulatory process. However, only a comparative approach will allow us to build up some more interesting research questions.

Table 5: Top ten central actors (Freeman's degree centrality)

	SFBC-SO	SFBC-IFO	SFBC-MLO	Average
1 Swiss Federal Banking Commission	+++	+++	+++	+++
2 Swiss Bankers Association	+++	+	+++	++
3 Accountants Chamber	+ -	+	++	+
4 Swiss Funds Association	+ -	++	-	+ -
5 Swiss National Bank	+	+ -	---	-
5 Audit & Rating	-	-	+ -	-
10 SWX Swiss Exchange	++	---	---	--
10 Swiss Assoc. of Indep. Stockbr.	---	---	++	--
10 GwG -FDF	---	---	++	--
10 MROS -FDJP	---	---	++	--

Conclusion

In this article, we argue that there is a need for research about the "real" (or de facto) independence of regulatory agencies. This kind of independence, representing a key variable for the study of both the functioning and performances of IRAs, allows us to examine the implementation of the new regulatory order executed by these agencies, i.e. regulatory capitalism (Levi-Faur 2005), which should involve the intensification of rigid, transparent and strict regulations. We conceive de facto independence as a two-dimensional concept, combining the degree of self-determination of agency's preferences with the extent of actors' capability to influence the activity of regulation. The test of the first component implies a qualitative inquiry based on indicators about the nature of the relationships between the relevant actors, in order to see if the political decision makers or the regulatees are a priori capable of determining the agency's preferences. The study of the second component consists of the use of the social network analysis tools to look at the process of production of rules by the agency (Serdült and Hirschi 2004; Serdült et al. 2004). In this way, we can distinguish which actors are the most influential on the regulatory outputs. The application of the current approach to the case of the Swiss Federal Banking Commission, from the '90s to the early 2000s - when a considerable amount of new rules was created - reveals some interesting features. To sum up, concerning the first component (i.e. the self-determination of preferences), the de facto independence of the SFBC is: quite high from political decision makers; and medium from the regulatees. For the second component, namely the

influence on regulatory outputs, the independence of the SFBC from political decision makers is high, whereas from the regulatees it is low. In other words, we notice that the preferences of the SFBC are moderately independent from the regulatees and - slightly more - from the political decision makers. Nevertheless, the former, especially through the Swiss Bankers Association, strongly affect the production of rules, where on the contrary the influence of the political decision makers is clearly low.

What is the lesson about the implementation of the regulatory capitalism in the Swiss financial sector, carried out by the SFBC? We can say that, even if it is important to note that the SFBC is a priori roughly de facto independent, the regulatees are still able to exogenously sway the activity of regulation, by quite extensively inserting their preferences into the regulatory outputs. This means that, although public regulation has widely substituted the self-regulation, the private actors are to a certain extent able to mould the implementation of the new rules. It is a way to reintroduce a bit of self-regulation by other means. This raises questions about the implementation of regulatory capitalism in general, too.

From a more general and theoretical point of view, a discussion of these results can only be partial and difficult to interpret, in absence of any true comparative dimension. However, what is possible for us to say for instance? Empirical evidence allows us to demonstrate the significance of the concept of de facto independence, in addition to a formal perspective. First, the room for manoeuvre concerning the implementation of the new laws shows the relevance of the notion of de facto independence. Second, we notice that actors other than the political decision makers - namely the regulatees - are very central. Enquiries on the functioning of IRAs therefore need a similar relational framework; this involves thinking about de facto independence as a point in a two (or more) dimensional space.

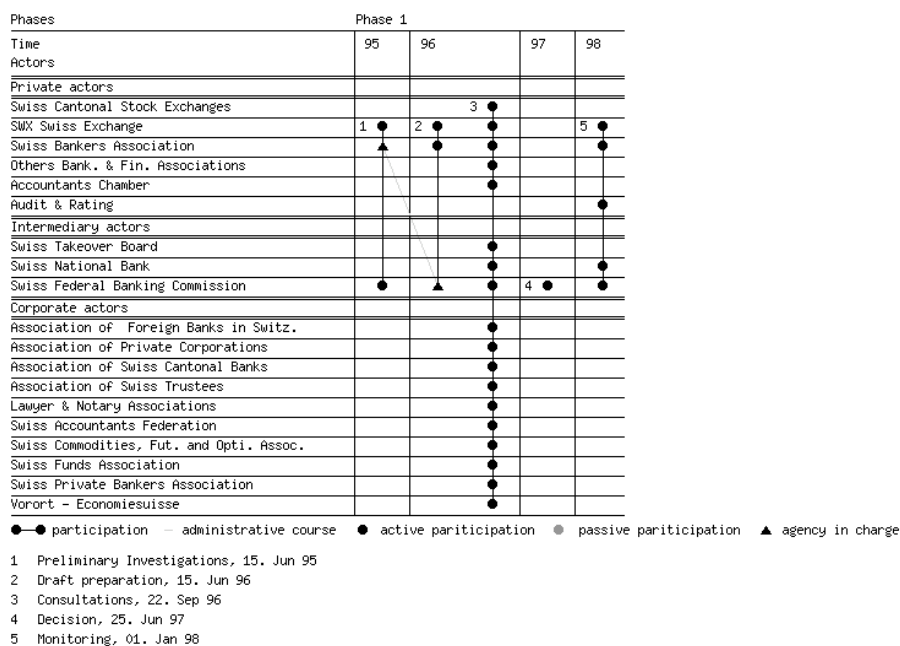
Appendix

1) List of participating actors (and acronyms)

- 1 Federal Authority Ag. Money Laud. – FDF (GwG-FDF)
- 2 Federal Bureau on Money Laundering – FDJP (MROS-FDJP)
- 3 Swiss Federal Bank Commission (SFBC)
- 4 Swiss National Bank (SNB)
- 5 Swiss Takeover Board (STB)
- 6 Federal Judge (FJ)
- 7 Swiss Bankers Association (SBA)
- 8 Supervisory Board for the Due Dil. Agr. (SBDA)
- 9 Swiss Private Bankers Association (SPBA)
- 10 Association of Swiss Cantonal Banks (ASCB)
- 11 Association of Foreign Banks (AFB)
- 12 Swiss Funds Association (SFA)
- 13 Swiss Commodities, Fut. and Opt. Assoc. (SCA)
- 14 Association of Private Corp. (APO)
- 15 Swiss Assoc. of Indep. Stockbrokers (SAIS)
- 16 Association of Swiss Trustees (AST)
- 17 Other Bank. & Fin. Assoc (BanFinA)
- 18 Accountants Chamber (AC)
- 19 Swiss Accountants Federation (SAF)
- 20 Layers & Notaries Associations (LNA)
- 21 Vorort-Economiesuisse (Vorort)
- 22 Swiss Union Of Real Estate Prof. (SURE)
- 23 SWX Swiss Exchange (SWX)
- 24 Zuercher Kantonalbank (ZK)
- 25 Swiss Cantonal Stock Exchanges (SCSE)
- 26 Audit & Rating (Audit)
- 27 Bank Sal. Oppenheim jr & Cie (Oppenheim)
- 28 CSFB (CSFB)
- 29 UBS (UBS)
- 30 TvT Compliance AG (TVT)

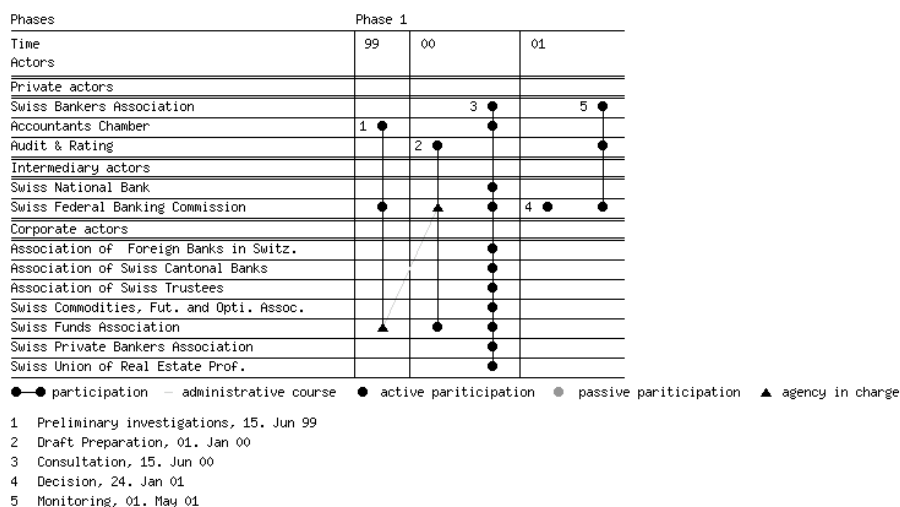
2) A-P-E-S

SFBC-S0



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SFBC-IF0



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SFBC-IFO Matrix

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SFBC-IFO

		1	2	3
		Degree	NrmDegree	Share
		-----	-----	-----
3	Swiss Federal Bank Commission	9.500	32.759	0.142
12	Swiss Funds Association	8.500	29.310	0.127
18	Accountants Chamber	6.000	20.690	0.090
7	Swiss Bankers Association	6.000	20.690	0.090
9	Swiss Private Bankers Association	5.000	17.241	0.075
13	Swiss Commodities, Fut. and Opt. Assoc.	5.000	17.241	0.075
16	Association of Swiss Trustees	5.000	17.241	0.075
22	Swiss Union Of Real Estate Prof.	5.000	17.241	0.075
11	Association of Foreign Banks	5.000	17.241	0.075
10	Association of Swiss Cantonal Banks	5.000	17.241	0.075
4	Swiss National Bank	5.000	17.241	0.075
26	Audit & Rating	2.000	6.897	0.030
6	Federal Judge	0.000	0.000	0.000
14	Association of Private Corp.	0.000	0.000	0.000
2	Federal Bureau on Money Laundering - FDJP	0.000	0.000	0.000
1	Federal Authority Ag. Money Laud. - FDF	0.000	0.000	0.000
17	Other Bank. & Fin. Assoc.	0.000	0.000	0.000
8	Supervisory Board for the Due Dil. Agr.	0.000	0.000	0.000
5	Swiss Takeover Board	0.000	0.000	0.000
20	Layers & Notaries Associations	0.000	0.000	0.000
21	Vorort-Economiesuisse	0.000	0.000	0.000
15	Swiss Assoc. of Indep. Stockbrokers	0.000	0.000	0.000
23	SWX Swiss Exchange	0.000	0.000	0.000
24	Zuercher Kantonalbank	0.000	0.000	0.000
25	Swiss Cantonal Stock Exchanges	0.000	0.000	0.000
19	Swiss Accountants Federation	0.000	0.000	0.000
27	Bank Sal. Oppenheim jr & Cie	0.000	0.000	0.000
28	CSFB	0.000	0.000	0.000
29	UBS	0.000	0.000	0.000
30	TvT Compliance AG	0.000	0.000	0.000

SFBC-MLO

		1	2	3
		Degree	NrmDegree	Share
7	Swiss Bankers Association	13.000	44.828	0.124
3	Swiss Federal Bank Commission	13.000	44.828	0.124
2	Federal Bureau on Money Laundering - FDJP	8.000	27.586	0.076
1	Federal Authority Ag. Money Laud. - FDF	8.000	27.586	0.076
15	Swiss Assoc. of Indep. Stockbrokers	8.000	27.586	0.076
18	Accountants Chamber	8.000	27.586	0.076
6	Federal Judge	6.000	20.690	0.057
27	Bank Sal. Oppenheim jr & Cie	6.000	20.690	0.057
24	Zuercher Kantonalbank	6.000	20.690	0.057
28	CSFB	6.000	20.690	0.057
29	UBS	6.000	20.690	0.057
8	Supervisory Board for the Due Dil. Agr.	6.000	20.690	0.057
30	TvT Compliance AG	6.000	20.690	0.057
26	Audit & Rating	3.000	10.345	0.029
12	Swiss Funds Association	2.000	6.897	0.019
5	Swiss Takeover Board	0.000	0.000	0.000
10	Association of Swiss Cantonal Banks	0.000	0.000	0.000
4	Swiss National Bank	0.000	0.000	0.000
19	Swiss Accountants Federation	0.000	0.000	0.000
17	Other Bank. & Fin. Assoc.	0.000	0.000	0.000
21	Vorort-Economiesuisse	0.000	0.000	0.000
22	Swiss Union Of Real Estate Prof.	0.000	0.000	0.000
16	Association of Swiss Trustees	0.000	0.000	0.000
9	Swiss Private Bankers Association	0.000	0.000	0.000
25	Swiss Cantonal Stock Exchanges	0.000	0.000	0.000
11	Association of Foreign Banks	0.000	0.000	0.000
20	Layers & Notaries Associations	0.000	0.000	0.000
13	Swiss Commodities, Fut. and Opt. Assoc.	0.000	0.000	0.000
14	Association of Private Corp.	0.000	0.000	0.000
23	SWX Swiss Exchange	0.000	0.000	0.000

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