CENTRE DE DROIT
BANCAIRE ET FINANCIER

Credit Suisse/UBS Merger

State responsibility (Act I)

Par Nicolas Béguin le 7 October 2025

The reasoning behind the Federal Court's decision, handed down following a hearing on 23 May 2025, rejecting a lawsuit brought against the Swiss Confederation in connection with the emergency merger of Credit Suisse Group AG (CS) into UBS Group AG (UBS), has finally been made public (TF, 23.5.2025, 2E_1/2024).

The case concerns a couple from Aargau who purchased CS shares on the stock exchange between 10 and 15 March 2023. In the days that followed, the crisis of confidence that was already undermining CS worsened significantly. Faced with the systemic risk to the Swiss financial centre, the Federal Council (FC) decided to intervene by invoking emergency powers (Art. 184 para. 3 and 185 para. 3 of the Constitution) in order to preserve the stability of the Swiss economy. Thus, by order of 16 March 2023, amended on 19 March 2023, the FC established an exceptional legal framework allowing, in particular, an emergency merger between CS and UBS. This mechanism provided, in particular, for the possibility of derogating from certain legal requirements, in particular that of the approval of the merger agreement by the general meetings of the two systemic banks.

On 20 March 2023, the couple decided to sell the recently acquired CS shares. However, they did so at a loss, as the market had already factored in the exchange ratio of 1/22.48, based on a merger consideration of CHF 3 billion. The couple then claimed compensation from the Federal Council for the loss incurred, but the latter rejected the claim. The couple then brought an action for liability against the Confederation before the Federal Supreme Court (FSC), based on the LRCF, which ruled as a single instance with full jurisdiction.

The plaintiffs' action was based on three main grounds : the unlawful use of emergency powers (***Ground 1***) ; the reassuring statements made by certain Federal Councillors regarding the capitalisation of CS, which allegedly prompted them to acquire shares (***Ground 2***) ; and finally, the pressure exerted by the Federal Council on the management of the two banks to induce them to sign the merger agreement (***Grievance 3***).

Before examining and successively rejecting the grievances raised, the Federal Supreme Court made two important preliminary clarifications.

Firstly, although the plaintiffs based their action on acts attributed to members of the Federal Council, their claim contained numerous references to acts by the Swiss National Bank and FINMA. However, the Federal Supreme Court cannot hear *in a single instance* actions resulting

from the official activities of members of these institutions (Art. 120 para. 1 let. c LTF), as the conditions for attracting jurisdiction are not met (ATF 126 II 145, c. 1b/bb). Such actions require a prior decision by the competent federal authority. This clarification is undoubtedly of interest to holders of AT1 bonds, whose amortisation was ordered by FINMA and who have just suffered a first setback in New York (see CDBF report of 1 October 2025).

Secondly, the Federal Supreme Court notes that the report of the Parliamentary Investigation Commission (PIC) of 17 May 2024 on the federal authorities' handling of the CS crisis was published in full in the Federal Gazette (FF 2025 515). Therefore, not only the existence of the report, but also its content, constitute well-known facts (ATF 150 III 209, c. 2), which in principle do not need to be alleged or proven. In this respect, this assessment contrasts sharply with the interim decision handed down on 15 August 2024 by the investigating judge in the same case, who rejected the applicants' request to suspend the proceedings pending the POC's report on the grounds that the commission's findings were not binding on the Federal Court. Our High Court nevertheless refers to it extensively, particularly in its examination of Grounds 2 and 3.

Grievance 1 : In support of their first argument, the applicants claim that CS was valued at approximately CHF 10 billion, which constituted a '*Geschenk*' from the Federal Council to UBS, to the detriment of CS shareholders, for an estimated amount of CHF 7 billion. They argue that the two banks should have negotiated directly, without the intervention of the Federal Council, in accordance with the decisions of the general meetings, which would necessarily have led to a higher price.

After pointing out that the Federal Council's responsibility in relation to the adoption of ordinances is subject to particularly strict conditions, the Federal Supreme Court refrained from ruling on the matter, as the argument put forward by the applicants could be dismissed on other grounds.

On the one hand, with regard to the *damage*, the price at which the couple acquired and then sold their shares was not set by the CF, but by the market ; moreover, the plaintiffs cannot rely on an allegedly higher intrinsic value to demonstrate damage, as this value is not directly reflected in their assets. Furthermore, in order to prove a loss of earnings in connection with a hypothetical takeover by another party, it would have been necessary to provide at least an approximate calculation (Art. 42 para. 2 CO) of the hypothetical state of their assets if the emergency order had not been adopted.

On the other hand, in terms of *causality*, the Federal Supreme Court notes that the loss in value of certain shares held by the couple, while the share price continued to fall, occurred before the emergency merger and, above all, that this loss did not result from the emergency order, but from the voluntary sale of the securities by the applicants themselves.

Grievance 2 : With regard to the complaint based on alleged inaccurate statements by the CF, the Federal Supreme Court found that the alleged damage, corresponding to the negative interest, had been established. Relying heavily on the CEP report, the Federal Supreme Court identifies and retains only one statement made by the CF : that of the former head of the Federal Department of Finance (FDF), made during a television interview on 13 December 2022, in which he expressed confidence in the future stability of CS.

Here again, it is not necessary to examine whether this statement constitutes a serious violation

attributable to the CF, nor to determine whether the dissemination of false information could constitute unlawful behaviour that the claimants could rely on. Indeed, the complaint is dismissed on the grounds of *causality*. According to the Federal Supreme Court, it is neither in the ordinary course of events nor in line with general life experience to invest tens of thousands of pounds in the shares of a company in free fall, solely because, three months earlier, the outgoing finance minister had expressed confidence in its stabilisation. Furthermore, the disputed statements are not such as to give rise to State liability based on *good faith* (Art. 9 Cst.).

Grievance 3 : The argument based on pressure exerted by the Federal Council is rejected, as there is no evidence in the CEP report, the Federal Council having limited itself to a mediating and coordinating role in the emergency merger ; furthermore, the applicants do not indicate which standard of conduct has been violated.

The judgment in question marks an important first step in the examination of the State's liability following the emergency merger between CS and UBS. While the reasoning of the Federal Supreme Court is hardly surprising, the decision is notable in that it attaches significant weight to the CEP report, which is sure to be used in other related proceedings.

Finally, it should be noted that the Federal Supreme Court's decision does not prejudge the proceedings pending before the Zurich Commercial Court against UBS, based on Art. 105 LFus. However, the couple of investors behind this decision, having disposed of their CS shares, will not be able to derive any *erga omnes* effect from it in the event of a favourable outcome.
