CENTRE DE DROIT
BANCAIRE ET FINANCIER

Credit Suisse/UBS Merger

State Liability (Part II)

Par Nicolas Béguin le 14 September 2026

The grounds for the Federal Supreme Court (FSC) judgment 2E_5/2024, delivered following the main hearing on 7 October 2025, were published on 2 September. Delivered by the same panel as in the related case 2E_1/2024 (commented on *in* Béguin, cdbf.ch/1437), this decision once again rejects the State's liability in the Credit Suisse/UBS merger.

The case pitted the Confederation against a private individual claiming damages for the loss in value suffered on his Credit Suisse Group AG (CS) following the emergency merger into UBS Group AG (UBS), made possible by the emergency ordinance issued by the Federal Council (FC) on 16 March 2023, amended on 19 March 2023 on the basis of Articles 184(3) and 185(3) of the Constitution (the Ordinance). Unlike the claimants in case 2E_1/2024, who had acquired and then sold their CS shares shortly before, and shortly after respectively, the adoption of the measures, the claimant had acquired his CS shares between 2014 and 2022 and had received UBS shares upon completion of the merger on the basis of an exchange ratio of 22.48 CS shares for one UBS share. The claimant invoked the State's liability (Art. 3(1) LRCF), alleging various unlawful acts on the part of the Federal Council, centred on four main grounds of complaint.

In a *first ground of appeal*, the claimant argued that the Federal Council had been aware of the crisis facing CS as early as autumn 2022 and should have acted accordingly at that time.

The Federal Supreme Court (TF) points out that an unlawful omission presupposes a position of guarantor. However, the claimant had neither alleged nor demonstrated the existence of a duty on the part of the Federal Council to act, nor the existence of an emergency situation within the meaning of Article 184(3) or Article 185(3) of the Constitution, prior to mid-March 2023. Furthermore, it was not the CF's responsibility to safeguard the interests of individual shareholders of a private company – in this case, CS – whose management had, moreover, refused on three occasions between October and December 2022 to seek *Emergency Liquidity* Assistance (ELA). As CS's situation subsequently stabilised, there was no longer any need to take action. In any event, the Federal Council had not remained inactive, having considered several rescue measures as early as October 2022.

In a *second ground of appeal*, the claimant argued that the conditions required for the adoption of the Order had not been met ; in particular, there was no sudden and inevitable danger.

This ground of appeal is dismissed. The Federal Supreme Court first points out that the

Confederation can only be held liable if the Federal Council has committed *'a serious breach of its official duties'*. Despite its unlimited jurisdiction, the Federal Supreme Court does not examine the conditions for the adoption of emergency measures as such, but only the existence of a serious breach within the aforementioned meaning in relation to the adoption of the Ordinance. In the present case, economic stability and the protection of the financial centre constitute fundamental legal interests which justify the invocation of the law of necessity ; the Federal Council was entitled to find that a serious and imminent danger existed, given the risk of a disorderly bankruptcy of a systemically important bank ; the urgency of the situation precluded the ordinary legislative process ; finally, the invocation of the right of necessity does not presuppose that the risk of insolvency is unforeseeable.

In a *third ground of appeal*, the applicant argued that the emergency merger between CS and UBS was neither in the public interest nor proportionate.

The Federal Supreme Court points out in this regard that the review of a necessity order is limited to its constitutionality, is exercised with great restraint and only engages the State's liability in the event of a serious breach of official duties.

The complaint relating to the *public interest* (Art. 5(2) of the Constitution) was subsequently dismissed. There was a considerable public interest in preventing an economic collapse coupled with a global financial crisis. As for the objection relating to banking concentration, the Federal Supreme Court acknowledges its legitimacy but considers that it is not unreasonable for competition law to give way to the overriding interest mentioned above. Moreover, FINMA had concluded that the merger did not eliminate effective competition in any market segment (Art. 10(3) of the Competition Act).

The same fate befell the complaint regarding *proportionality* (Art. 5(2) of the Constitution). The Federal Council's assessment was based on sound analyses and was not manifestly unconstitutional. The takeover by UBS constituted the best solution, and there was no less intrusive means offering the same benefits with fewer risks. The claimant's concern regarding the creation of a weakened banking behemoth – with the emergence of increased systemic risk – was legitimate, but there was no indication that UBS would be unable to integrate CS thanks to the state guarantees granted.

In a *fourth ground*, the claimant argued that the Ordinance would itself be unlawful since the removal of shareholders' rights provided for in its Article 10a did not provide for compensation for shareholders, and that it would violate the principle of good faith (Art. 5(3) of the Constitution), the prohibition of arbitrariness (Art. 9 of the Constitution) and the guarantee of property rights (Art. 26 of the Constitution).

The argument is rejected. The Federal Supreme Court accepts that the Federal Council could, on the basis of emergency powers, derogate from the Merger Act (LFus) by excluding shareholders' rights to information and participation, this exclusion remaining subject to FINMA's supervision and being justified by the urgency of the matter and the overriding public interest. The fact that the interests of Switzerland as a whole were prioritised over those of the shareholders did not constitute a serious breach of official duties. Furthermore, the absence of compensation in the Ordinance for CS shareholders was neither contrary to good faith nor arbitrary : it merely excluded the corporate rights of the shareholders concerned, and not their property rights, which remain guaranteed by the judicial review mechanism provided for in

Article 105(1) of the Merger Act.

With regard to the alleged violation of the guarantee of property rights (Article 26 of the Constitution), the Federal Supreme Court notes that the applicant is claiming financial loss (corresponding to the difference between the acquisition cost of the shares and the loss in value suffered as a result of the merger). However, the guarantee of property rights does not guarantee a right to assets of a specific value. Furthermore, according to the settled case-law of the Federal Supreme Court, this constitutional provision does not constitute a standard of conduct intended to protect assets. Moreover, it was not the Federal Council that set the purchase price and the exchange ratio, but the two major banks. The claimant cannot therefore rely on this basis to establish any unlawful conduct for the purposes of Article 3(1) of the Federal Constitution.

Finally, from the perspective of protection against arbitrariness and good faith (Article 9 of the Constitution), a shareholding in a private-law company does not constitute an acquired right. Nor do the non-pecuniary rights of shareholders constitute essential elements of fundamental rights before which the right to urgent relief should give way.

The claimant’s action is dismissed at the stage of assessing unlawfulness, without it being necessary to examine the other conditions for liability (damage and causation).

This judgement further diminishes the prospects for CS shareholders of obtaining compensation from the Confederation in the Swiss courts on the basis of the LRCF. Furthermore, the judges at Mon-Repos have shown particular sensitivity to the unique circumstances in which the Federal Council had to manage the crisis facing CS, to the overriding national and international interests at stake, and to the decisions that had to be taken as a matter of urgency, whilst emphasising the room for manoeuvre that the government must be afforded when it comes to rescue measures. These are all factors that the authorities, notably FINMA, will certainly put forward should they be held liable, particularly in relation to the write-down of AT1 instruments ordered pursuant to Article 5a of the Ordinance.