

Merger of Credit Suisse and UBS

What is the legal basis for imposing the decision on the shareholders, and what are their rights in Switzerland?



On Sunday, March 19, 2023, at 7:30 pm, the shareholders of Credit Suisse were informed, for the most part at the same time as the general public, that the bank would be absorbed by UBS in a merger. The takeover price was set at 3 billion Swiss francs. This is less than half of the group's market valuation at the time of the close of trading on March 17, and means that Credit Suisse shareholders will receive one UBS share in exchange for 22.48 Credit Suisse shares.

Such a transaction, carried out without consulting the shareholders, and without the approval of the general meetings of the merged companies, is in principle not possible.

Indeed, the merger of two companies limited by shares, including banks organized in this form, requires a favorable decision of the general meetings of the two companies concerned. The conditions and the procedure are essentially governed by the Federal Law on Company Mergers (Merger Act).

In order to allow this operation, the Swiss Government has made use of the “right of necessity” which allows it to issue rules by way of urgent ordinance when the safeguarding of the country's interests so requires (Art. 184 para. 3 and 185 para. 3 of the Swiss Constitution).

In an explanatory report of March 16, 2023, the government justified the use of emergency legislation by referring to the “serious consequences” of an “emergency or bankruptcy situation” affecting a systemically important bank for the Swiss banking system and for the international financial system in general. Among other things, it mentions the risk that clients (e.g. households and businesses) would no longer be able to carry out their day-to-day spending and investments if their accounts were blocked, the impact this would have on consumption and on Switzerland's financial situation, potential problems with Switzerland's liquidity supply, and the damage to the reputation of and trust in the Swiss financial center.



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Based on these considerations, the Swiss Federal Council issued an ordinance on March 16, 2023, which essentially provides the necessary legal basis for the liquidity guarantees that were supposed to be granted to the bank by the Swiss National Bank (SNB) in the form of loans. On the same day, Credit Suisse announced that it had taken out a short-term loan from the SNB in the amount of CHF 50 billion.

In view of the market developments following this announcement, which failed to restore confidence, and following negotiations under the aegis of the Swiss Federal Council in the days that followed, the Government amended the ordinance of 16 March 2023 on Sunday 19 March by adding an article 10a.

According to this provision, subject to the approval of Swiss Financial Market Supervisory Authority (FINMA), the execution of transactions under the Merger Act does not require a decision by the general meetings of the companies concerned if they are internationally active systemically important banks (or part of a systemically important group), and insofar as this is necessary to protect the Swiss economy and the Swiss financial system. In this sense, FINMA's approval replaces the approval usually given by the general meeting of shareholders, respectively by the shareholders.

The requirements regarding the duty to consult the shareholders, the preparation of interim financial statements, a merger report and the verification of this report and the merger agreement by an accredited auditor are also waived.

A general clause also allows for derogations from other transaction requirements set forth in the Merger Act, again with the approval of FINMA, and after consultation with the cantonal commercial register authorities and the Federal Commercial Register Office.

It is in application of this provision, adopted by way of an urgent ordinance, that the merger between Credit Suisse and UBS could be decided without prior consultation (at least formally, as far as the main shareholders are concerned) or vote of the shareholders of both banks.

Several shareholders or shareholder representatives of Credit Suisse have already expressed their dissatisfaction with the decision, in particular with regard to the amount of the transaction. Depending on market developments and on the basis of the information that will be progressively disclosed to them, it is not impossible that UBS shareholders will also consider themselves wronged by the transaction.

In this respect, several legal actions are available to shareholders to enforce their rights under the provisions of the Merger Act.



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According to article 105 of the Merger Act, shareholders may, among other things, bring an action against the acquiring company for the “examination of the shares and membership rights”, if they believe that their membership rights have not been adequately maintained. The purpose of this action is to allow shareholders who consider themselves wronged, in particular in the context of a merger, to bring before the judge the question of the exchange ratio retained in the transaction (in the context of the merger between Credit Suisse and UBS: one UBS share for 22.48 Credit Suisse shares), and to require that the court reform the terms of the transaction. If the court comes to the conclusion that the exchange ratio was indeed inadequate, it may order the acquiring company to pay compensation to the wronged shareholders. Such a judgment has effect with respect to all shareholders of the companies concerned, provided that they have the same legal status as the shareholders who brought the action.

The Merger Act also provides for the possibility for a shareholder (or a creditor) to sue several categories of persons who have been involved in a company restructuring under the Merger Act, in particular the members of the management and the board of directors of the companies concerned, if they have wrongfully caused them damage (art. 108 Merger Act).

It should be noted that, for both types of actions, shareholders who believe they have been adversely affected by the transaction have only two months to bring a claim before a court, starting from the publication of the merger in the Commercial Register (the date of which remains uncertain in the case of the merger between UBS and Credit Suisse).

No derogation from these provisions is provided for in the Swiss Federal Council's ordinance, although one should reserve further interventions by the Federal Council as well as the provisions of the law that the Government will submit to parliament to transpose the urgent ordinance it has issued into ordinary law.

That being pointed out, based on information at disposal and as a preliminary analysis, legal actions of this type could be initiated by shareholders of Credit Suisse, but also of UBS, who would consider that the terms of the transaction are unfavorable to them and have not been adequately determined in view of all the relevant circumstances to be taken into account, in particular with regard to the valuation of Credit Suisse.

One may assume that this and other legal risks have been taken into account in the discussions on the guarantees granted to UBS by the Swiss authorities.



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