

Acquisition of Credit Suisse by UBS

On March 19, 2023, it was announced that UBS plans to acquire Credit Suisse in an all-shares transaction, valuing Credit Suisse at CHF 0.76 per share / CHF 3 billion. The Swiss Federal Council, the Swiss Financial Market Supervisory Authority FINMA and the Swiss National Bank expressed their support for the transaction. The transaction is expected to close in Q2/23 following approvals by relevant authorities. AT1 capital instruments issued by Credit Suisse of appr. CHF 16 billion in aggregate have been written-down in full.

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Introduction

Pursuant to public information, Credit Suisse was experiencing a crisis of confidence and faced outflows of clients funds, intensified by the recent events in the US financial markets.

On March 16, 2023, Credit Suisse announced the intention to access a covered loan facility as well as a short-term liquidity facility of up to appr. CHF 50 billion.

Following intervention by, and request of, the Swiss Federal Department of Finance, the Swiss National Bank and the Swiss Financial Market Supervisory Authority FINMA, Credit Suisse and UBS entered into a merger agreement on March 19, 2023.

The Swiss Federal Council on March 16, 2023 issued an ordinance regarding additional liquidity

assistance loans and the granting of loan loss guarantees by the Swiss Confederation for liquidity assistance loans by the Swiss National Bank to systematically important banks (the Additional Liquidity Assistance Ordinance). In order to adapt this ordinance to the most recent developments, the Swiss Federal Council amended this Additional Liquidity Assistance Ordinance, effective on March 19, 2023 (the Amended Additional Liquidity Assistance Ordinance).

a) Liquidity Assistance Loan

On March 19, 2023, the Swiss Federal Council announced that it would support the merger with a public liquidity backstop and that it issues to the Swiss National Bank a loan loss guarantee of up to CHF 100 billion to secure a corresponding liquidity assistance loan to Credit Suisse (the Liquidity Assistance Loan).

The Amended Additional Liquidity Assistance Ordinance provides that the principal and interest on Liquidity Assistance Loans are privileged in a bankruptcy as they are allocated to the second creditor class in accordance with Art. 219 of the Swiss Debt Enforcement and Bankruptcy Act (Bundesgesetz über Schuldbetreibung und Konkurs).

b) M&A Transaction

Pursuant to public information, the target of the acquisition will be Credit Suisse Group AG, the SIX-listed parent company of Credit Suisse Group. While not expressly stated so far, it is expected that the acquiring entity will be UBS Group AG, the SIX-listed parent company of UBS Group. This means that UBS will acquire all of Credit Suisse Group in an all-shares merger transaction, rather than an outright purchase of the individual shares. This will entail that Credit Suisse Group AG (as absorbed entity) will upon effectiveness of the merger transfer all of its assets and liabilities to UBS (as absorbing entity) by way of universal succession under the Swiss Merger Act (Fusionsgesetz) and that it will cease to exist. As such, Credit Suisse AG, being the intermediate holding company of the group and currently a subsidiary of Credit Suisse Group AG will become a direct subsidiary of UBS. The legal entity UBS Group AG will continue to exist.

It is expected that the share consideration for the shareholders of Credit Suisse Group AG will require the issuance of new shares in UBS. Under Swiss laws, a merger usually requires affirmative resolutions by the shareholders of the absorbed entity and the absorbing entity. However, in this case, the Swiss Federal Council has exercised its emergency powers to facilitate a swift consummation of the merger without the need for a shareholder approval. The legal basis for this is the newly established Art. 10a (Deviations from the Merger Act) of the Amended Additional Liquidity Assistance Ordinance. In accordance with this new rule, the merger process will also not require the involved legal entities to provide a merger report and an audit of the merger agreement, the merger report or the balance sheets of the involved legal entities. Furthermore, disclosure obligations relating to those documents under the Swiss Merger Act do not apply.

Emergency powers are set out in Art. 184 and 185 of the Federal Constitution of the Swiss Confederation (Bundesverfassung). It is expected that the Federal Council will publish the rationale for the Amended Additional Liquidity Assistance Ordinance and its decisions in the coming days.

Initial information indicates that UBS will particularly keep the Swiss bank of Credit Suisse Group (i.e. Credit Suisse (Schweiz) AG), but that it designated certain other assets, particularly in the

investment banking area, as non-core. To date, it cannot yet be assessed how this will impact Credit Suisse's already published plans to spin-off its investment banking division into a newly formed entity (CS First Boston).

c) Resolution Aspects

Credit Suisse and UBS, both qualifying as globally systematically important banking groups, are generally subject to the specific too-big-to-fail regime. Such regime foresees increased capital and liquidity requirements as well as specific rules for recovery and resolutions procedures.

The principles of bank recovery and resolution are set out in Chapters 11 and 12 of the Swiss Banking Act (Art. 25 to 37g). They generally follow the recommendations on the bank resolution framework by the Financial Stability Board. To note, these principles were only incorporated into the Swiss Banking Act at the beginning of 2023. Their predecessor rules in the FINMA Banking Insolvency Ordinance (Bankeninsolvenzverordnung-FINMA) formally continue to apply until repeal or amendment of such ordinance, albeit in case of deviations, the rules in the Swiss Banking Act prevail.

Under the Swiss Banking Act, FINMA is authorized to order protective measures (Schutzmassnahmen), restructuring proceedings (Sanierungsverfahren) or an insolvent liquidation, i.e. a bankruptcy (Bankenkongkurs), if there is justified concern that a bank is over-indebted or has serious liquidity issues or where a bank does no longer fulfil the applicable capital adequacy requirements after the expiry of a deadline set by FINMA. FINMA has broad competences and discretion when applying such powers and instruments, noting though, that the ordering of bankruptcy would require that there are no prospects of a successful restructuring by means of restructuring proceedings or that restructuring proceedings have failed.

Pursuant to public statements from FINMA, FINMA's actions in connection with the merger were not based on such resolution powers.

d) Write-Down

In its communication, FINMA stated that "the extraordinary government support [would] trigger a complete write-down of the nominal value of all AT1 capital instruments of Credit Suisse in the amount of around CHF 16 billion, and thus an increase in core capital."

The additional tier 1 capital (AT1 capital) instruments present going-concern capital to be maintained in accordance with applicable capital / own fund requirements. They are to separate from the additional debt instruments that Credit Suisse issued to meet requirements under the bank recovery and resolution regime for globally systematically important banks (i.e., the total loss absorbing capacity, TLAC) for which Credit Suisse issued specific "bail-in bonds". Given that FINMA did not exercise resolution powers and did not apply restructuring measures under the Swiss Banking Act, neither these "bail-in bonds" nor other creditors were bailed-in.

The possibility of a write-down of AT1 capital instruments is generally provided for in the documentation governing the respective instruments. These generally foresee a write-down triggered in the event of a decrease of regulatory common equity tier 1 (CET 1) capital requirements below relevant thresholds or upon the occurrence of certain viability events. One of the viability events seems to be described as follows "customary measures to improve [Credit

Suisse Group AG's] capital adequacy being at the time inadequate or unfeasible, [Credit Suisse Group AG] has received an irrevocable commitment of extraordinary support from the Public Sector (beyond customary transactions and arrangements in the ordinary course) that has, or imminently will have, the effect of improving [Credit Suisse Group AG's] capital adequacy and without which, in the determination of the Regulator, [Credit Suisse Group AG] would have become insolvent, bankrupt, unable to pay a material part of its debt as they fall due or unable to carry on its business."

For this trigger event, there is, apart from a capital inadequacy on the part of Credit Suisse Group AG (i) a need for extraordinary support from the Public Sector, which includes the Swiss Government and the Swiss National Bank and (ii) a determination by FINMA that without such extraordinary support, Credit Suisse Group AG would have become insolvent, bankrupt, unable to pay a material part of its debts as they fall due or unable to carry on its business. The wording implies broad discretion for FINMA to come to the mentioned determination. The documentation governing the AT1 capital instruments indicate that the notification or determination by the Regulator will constitute the viability event.

The Amended Liquidity Assistance Ordinance provides for an authorization of FINMA to order a debtor of AT1 capital instruments or the financial group to write-down such liabilities in connection with the approval of a commitment loan to back a loan loss guarantee towards the Swiss National Bank. The exercise of this authorization, in comparison to the viability event triggering a write-down as mentioned above, requires only the granting of a liquidity assistance loan with loan loss guarantee, but also then entails discretion on the part of FINMA whether to order the write-down.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.



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