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Golden Shares (actions privilégiées) -> une possibilité en droit suisse ?

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Golden Shares -> a possibility under Swiss law?

1. Introduction

Golden Shares were historically used by states in the 20th century to maintain control over formerly state-owned companies, in particular to prevent other states from acquiring control over these companies. *Golden shares are* still used in most Asian countries (notably China).

This term has become generic to designate preferred shares in relation to others within the same share capital.

Is this possible under Swiss company law?

When setting up a limited company (*Aktiengesellschaft, société anonyme*), many entrepreneurs would ideally like to invest as little as possible in share capital, while retaining majority control of the company in terms of voting rights and the right to receive maximum dividends.

In practice, this wish often proves illusory, as entrepreneurs are so dependent on third-party investments. The Swiss legal system does, however, provide tools for maximizing the voting rights of certain shareholders, as well as their entitlement to dividends. These include shares with preferential voting rights (*Stimmrechtsaktien*), preference shares (*Vorzugsaktien*), and participation certificates

(*Partizipationsscheine*), which can be distributed instead of shares.

This paper describes the Swiss legal framework for two different classes of shares that can be used as *Golden Shares*.

2. Shares with preferential voting rights (*Stimmrechtsaktien*)

Under Swiss law, the basic rule (article 692 of the Swiss Code of Obligations) is that shareholders exercise their voting rights at the Annual General Meeting in proportion to the par value of their shares.

However, a public limited company may decide to provide in its articles of association for the special case provided for in Article 693 of the Swiss Code of Obligations, i.e. that voting rights will be exercised in proportion to the number of shares held by each shareholder, irrespective of par value, so that each share carries the right to a single vote. This company will then issue separate classes of shares with different par values, namely (i) ordinary shares and (ii) shares with preferential voting rights.

A share with preferential voting rights is one whose par value is lower than that of ordinary shares. Because of the lower par value, the obligation to pay up the shares is therefore lower, enabling a shareholder to buy more shares and thus obtain more voting rights with a lower investment. If voting rights are modified in the articles of association so that each share has one vote irrespective of its par value, the voting share is given preference.

For example, a public limited company with a share capital of CHF 100,000 could issue the following classes of shares:

- **Class 1**: 200 shares with a par value of CHF 100 (shares with preferential voting rights)

- **Category 2**: 80 shares with a par value of CHF 1000 (ordinary shares)

To introduce these two categories of shares, a public limited company must include shares with preferential voting rights in its articles of association. In addition, shares with preferential voting rights must be fully paid-up registered shares, and the registered value of shares with preferential voting rights must not be more than 10 times lower than the registered value of ordinary shares.

It should also be noted that for certain decisions to be taken by the shareholders, the determination of voting rights in proportion to the number of shares does not apply when it comes to (i) appointing the auditors, (ii) appointing experts to audit all or part of the management, (iii) deciding to institute a special examination, or (iv) deciding to initiate a liability suit.

3. Preference shares (*Vorzugsaktien*)

Article 656 of the Swiss Code of Obligations (CO) allows a company to stipulate in its articles of association that so-called “preference shares” confer pecuniary advantages on their holders. In this way, the company’s articles of association can provide for advantages over dividends, such as the right to receive additional dividends, the payment of a minimum dividend before distribution to ordinary shareholders, an advantage in the company’s liquidation share, or preferential subscription rights in the event of a capital increase. These preferred shares will be offered to investors who are more interested in a return on their investment than in controlling the company in which they have invested.

4. Participation certificates (*Partizipationsscheine*)

Entrepreneurs who need additional funds, but do not wish to confer voting rights on investors, can also include in the articles of association a participation capital divided into shares, commonly known as “participation certificates”. These participation certificates are issued in exchange for a contribution. They have a nominal value, but do not confer voting rights or any rights linked to voting rights.

In the case of unlisted companies, however, participation capital may not exceed twice the share capital.

5. Practical example

In view of the tools described above, an entrepreneur with limited capital who wants to create a public limited company while maximizing his rights could, for example, opt for the following share capital:

Share capital of CHF 100,000 divided into the following two classes of shares:

Category 1: 1002 preference registered shares (with voting rights and preferential dividend entitlement) with a par value of CHF 50 each.

Category 2: 499 ordinary registered shares with a par value of CHF 100.00 each.

Thus, for an investment of CHF 50,100, the holder of Class 1 shares will have 1,002 votes, i.e. 67% of the voting rights, while the holder of Class 2 shares, for an investment of CHF 49,900, will have 499 votes.

To make Class 2 shares more attractive, they should be entitled to a preferential dividend.

The company’s governance will thus be decoupled from the economic attractiveness of its shares.

Lastly, should further liquidity be required, the company may issue 200,000 participation certificates with a par value of CHF 1.00 each.

In conclusion, it is clear that Swiss law allows entrepreneurs or investors to use *Golden Shares* to retain control or privileges within the limited company they are planning to set up.

Source : https://www.wg-avocats.ch/en/actualites/company-law/golden-shares-a-possibility-under-swiss-law/