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Dividend-right certificates may be an attractive alternative to compensate key stakeholders in the company

Articles 653*ff* of the Swiss Code of Obligations (CO) stipulate that a public limited company's conditional capital is reserved for employees and beneficiaries of conversion rights. It is therefore closed to external agents who are neither employees nor members of the board of directors. However, it may be important for a company, especially in its start-up phase, to secure the loyalty and long-term support of stakeholders of this kind who are often vital to the success of a business.

Dividend-right certificates, for which provision is made in CO Article 657, can be a suitable solution.

To be valid within the meaning of this provision, dividend-right certificates must, however, fulfil the following two general conditions:

- Firstly, the articles of association must make provision for allocation of these dividend-right certificates and describe the conditions for doing so in relatively detailed terms, because the articles must state the categories of persons who may be beneficiaries of these certificates, their number and the nature of the rights associated with such certificates. In this regard, the articles of association may stipulate that dividend-right certificates provide entitlement to a share of attributable profits as reported in the balance sheet, a share in liquidation proceeds or a preferential right to subscribe to new shares.

- Secondly, dividend-right certificates must be allocated "in favour of persons linked with the company by previous capital participation." In this connection, the code lists not just shareholders, creditors and employees, but adds "or similar", i.e. all persons similarly connected with the company. The legislator has in mind here all stakeholders in the company who have contributed to its development and therefore been obliged to abandon or sacrifice some of their claims to a share in the success of the business. By granting them dividend-right certificates, the company can therefore reward them for their commitment by promising that they will receive a specific share in the attributable profits reported in the balance sheet, if any such profit has been made.

A word of warning: dividend-right certificates are issued without capital or any contribution whatsoever. They cannot be equated with either a share or a participation certificate. They therefore only provide entitlement to a share in the profits, if any profit has been made. According to increasingly unanimous legal thinking, the articles of association or regulations stipulating the conditions applicable to the community of holders of dividend-right certificates – as adopted by the general meeting of shareholders – must determine these holders' right to information, so enabling them to benefit from the information needed to make sure that their rights are being respected by the company.

Dividend-right certificates may be issued as a physical certificated security, but that is not compulsory. The board of directors must therefore keep a register of these certificates. Provision may be made for the company's right to buy back these certificates if it has the equity needed to do so, having due regard to statutory provisions governing the protection of a company's share capital.

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