

WilhelmGilliéron

AVOCATS



Auteur: Christophe Wilhelm | Le : 21 June 2021

Some details on the different modalities for the distribution of dividends by a corporation under Swiss law

Dividends can be broadly classified into the following categories: ordinary dividends, extraordinary dividends, interim dividends and dividend advances.

1. **Ordinary dividends** are those decided by the General Meeting of Shareholders at its annual general meeting following approval of the statutory accounts and the report of the auditors. These dividends can only be distributed after the allocations to the legal and statutory reserves have been made in accordance with the law or the articles of association and on the basis of the annual profit shown in the balance sheet.
2. An **“extraordinary dividend”** is a dividend decided by the general meeting in addition to the current year’s profit and which is based on the distributable assets of the previous accounting years.
3. An **“interim dividend”** is defined as a share of the profit dividend of the current financial year, which has not yet been closed.
4. Finally, a **“dividend advance”** consists of the company loaning its shareholders amounts based on future dividend payments.

What is the legality under Swiss law of these various dividend distributions?

In any case, the following basic rules must be respected:

1. Dividends may only be distributed by a company if the legal and statutory reserves have been made up in accordance with the law and the articles of association (674 CO).
2. Dividends may only be paid out of the profit shown on the balance sheet for the previous year and from the reserves set aside for this purpose (675 CO).
3. The distribution of dividends must be decided by the general meeting (GM) of the company’s shareholders at an ordinary or extraordinary general meeting duly convened by the board of directors.
4. Dividends must be distributed equally among the shareholders of the same class of shares on the basis of the paid-up nominal value (without taking into account the premium) of their respective holdings (660 CO). The Court has recently

recalled that any violation of this rule by the general meeting of shareholders must be the subject of an action for annulment, failing which the shareholder concerned loses his claim to payment of the unpaid dividend (cf. ATF of 21.1.2021 - 4A_98/2020)

5. Dividends may be distributed in kind provided that the other rules governing the distribution of cash dividends are complied with and that equality between shareholders is observed.
6. The GA shall base this on:
 1. A balance sheet less than six months old is presented to the GA by the Board of Directors;
 2. This balance sheet shows the profits of the past year or the reported profits of the previous year(s) (i.e., even if the current year is not profitable);
 3. The GM approves the distribution of dividends by a simple majority.

The special case of extraordinary, interim and advance dividends:

1. Eligibility of extraordinary dividends:

As defined above, extraordinary dividends are permitted under Swiss corporate law, provided that the following conditions are met:

1. a special report of the auditor confirms that this distribution of extraordinary dividends is made in accordance with Swiss company law, in particular with the rule of the Swiss Code of Obligations (CO) 675, which stipulates that dividends may only be paid out of the profit shown in the balance sheet and out of the reserves set aside for this purpose;
2. this report is based on financial accounts that are no more than 6 months old.

2. Eligibility of Interim Dividends:

From a strictly legal point of view, interim dividends are not permitted under Swiss corporate law. The reason for this rule is that dividends can only be decided on the basis of the final balance sheet of the past financial year showing a distributable profit.

However, in practice, an interim dividend tends to be allowed provided that it is based on interim financial statements that have been audited for less than six months and show distributable profits in accordance with Article 675 CO and the articles of association.

The new law on corporations, which is expected to come into force on January 1st, 2023 (article 675 nCO), will expressly allow for the payment of interim dividends, so-called "intermediate dividends" in the new law. We even believe that provisions in the articles of association expressly providing for the possibility of making such interim dividend distributions under the above-mentioned conditions should already be authorized by the commercial register.

3. Eligibility of dividend advances:

An advance on dividends is allowed by Swiss corporate law practice, although it is not mentioned in the law. It takes the form of a loan to the shareholders from the current profit. It is repaid by offsetting it against the dividend subsequently decided by the General Meeting of Shareholders on the basis of the profit resulting from the balance sheet for that year.

What are the penalties for not complying with the above-mentioned rules?

Violation of the above-mentioned rules by the general meeting will result in the annulment (706 and 706a OR), or even the nullity, of the GM that decided on these distributions. In case of admission, the distributions already made must be returned by those who benefited from them in accordance with the restitution action provided for in Article 678 CO. The action for restitution belongs to the company acting through its board of directors or to a shareholder. They act in payment to the company. The board of directors and/or the auditors may also be held liable in this context.

Source : <https://www.wg-avocats.ch/en/news/company-law/distribution-of-dividends/>