



Corporate Law Newsletter

No Participation Certificates for Swiss Cooperatives

Introduction

In the decision rendered on April 28, 2014 (4A_363/2013) the Federal Supreme Court quashed upon appeal a decision of the Federal Administrative Court and found that a Swiss cooperative may not issue participation certificates.

Facts of the case

The Raiffeisen Group is one of the third largest banking groups in Switzerland with a strong focus on retail and consists of 316 independent banks organised as a cooperative under Swiss law. Raiffeisen Switzerland also a cooperative under Swiss law is responsible for the strategic management and for the risk control, liquidity and conservation of own funds of the Raiffeisen Group.

In order to strengthen its capital Raiffeisen Switzerland planned to issue participation capital certificates and requested the Federal Commercial Registry to confirm that its articles of association providing for the issue of participation capital certificates in the amount of CHF 300 Million is in compliance with Swiss law. Participation capital certificates as opposed to membership certificates do not grant any voting rights.

The Federal Commercial Registry held that the proposed articles of association of the cooperative cannot be approved. The participation capital certificates contain essential elements of the participation certificates of the Swiss corporation limited by shares (Aktiengesellschaft) which however are not permitted under the law applicable to cooperatives.

The decision of the Federal Commercial Registry was appealed and the Federal Administrative Court overturned the decision of the Federal Commercial

Registry. The Federal Administrative Court held that the law on cooperatives contains a gap, since it does not explicitly permit participation capital certificates for cooperatives. Such gaps must be filled by the judge in accordance with the principles applied by the legislator and the Federal Administrative Court filled the gap in favour of Raiffeisen Switzerland, thus overturning the decision of the Federal Commercial Registry.

The decision of the Federal Administrative Court was then appealed to the Federal Supreme Court which overturned the decision of the Federal Administrative Court in essence confirming the position taken by the Federal Commercial Registry.

Reasoning

The Federal Supreme Court went at length analysing the history of participation certificates, the legal literature addressing this issue and the explicit introduction of participation certificates into Swiss corporate law in 1992 for the company limited by shares as a method to raise equity. The participation certificate is to be distinguished from the so called benefice certificate (Genussschein) which contains no par value and may not be used to raise capital under the revised law. The law on cooperatives contains no explicit rules on participation certificates.

In connection with a study commissioned in January 1993 by the Federal Department of Justice, the group de reflexion found that the issue of participation certificates should be explicitly addressed also for cooperatives. Given the fact that a cooperative has not the system of a fixed capital, the rules applicable to a corporation limited by shares may not be applied by analogy to a cooperative.

In connection with the revision of the law on limited liability companies (GmbH) benefice certificates but



not participation certificates were introduced also for limited liability companies.

The Federal Supreme Court then analysed under what circumstance a gap exists in the law which will have to be filled by the court *modi legislatori*.

The court argued that unlike for a company limited by shares, the law on limited liability companies contains no explicit provision on the creation of participation certificates. According to the Federal Council's Report to the revision of the law of the limited liability company, participation certificates were intentionally excluded as a means to raise capital, given the absence of minimal protection rights such as the right to request a special audit.

The Federal Supreme Court found the participation in the equity of a cooperative to be intrinsically linked to the personal membership right. Contrary to a corporation limited by shares, the equity participation in a cooperative is not designed as an investment negotiable on the capital market but is a consequence of the membership rights which carries obligations beyond the mere payment of the capital subscribed to. The decision taken by the legislature to permit participation certificates only for corporate forms suitable for raising capital in the financial markets leads to the conclusion that the raising of equity is conclusively dealt with in the law for cooperatives.

The Federal Supreme Court found confirmation in the legal materials of the legislature's intent to limit the availability of participation certificates to such legal persons for which the law provides special legal protection.

Consequently the Federal Supreme Court held that a cooperative is not entitled to issue participation capital certificates and quashed the decision of the Federal Administrative Court.

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This Newsletter is not intended to provide legal advice. Before taking action or relying on the information provided, specific advice should be sought.